Supreme Court, U.S.
FILED
JAN 28 1992
OFFICE OF THE CLERK

(1)

91-1238

No. _____

In The

Supreme Court of the United States

October Term, 1991

WILLIAM W. PATY, HERBERT J. APAKA, JR., MOSES W. KEALOHA, J. DOUGLAS ING, JOHN ARISUMI, HERBERT ARATA, AND JOHN WAIHEE,

Petitioners,

vs.

DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, THE HOU HAWAIIANS, and KAMUELA PRICE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in light of the principles elaborated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and its progeny, *e.g., Siegert v. Gilley*, 111 S. Ct. 1789 (1991), and *Hunter v. Bryant*, 112 S. Ct. 532 (U.S. Dec. 16, 1991), the court of appeals erred when, in the face of its holding that the points of law necessary to the merits of Respondents' claims that Petitioners had violated section 5(f) of the Hawaii Admission Act were "subject to debate," "not entirely clear," and "problematic to say the least," it drastically increased the burdens to which Petitioners are subject in this case by refusing to terminate the claims against Petitioners on qualified immunity grounds, spawning a new round of litigation in the district court over the application of *Harlow* immunity principles?

2. Whether the complaint in this action, which uses the term "individually" in the caption as the means of notice to petitioners that a money remedy is sought against them in their personal capacities, was properly held by the court of appeals, despite conflicting rulings of other circuits, to be seeking damages payable from petitioners' personal assets?

3. Whether § 5(f) of the Hawaii Admission Act, which requires that lands subject thereto be used for "one or more" of five purposes "in such manner as the constitution and laws" of Hawaii "may provide," and which authorizes a suit "by the United States" as the remedy for the use of trust lands "for any other object," is enforceable, despite the Equal Footing Doctrine and principles of

QUESTIONS PRESENTED – Continued

federalism, by private suits invoking 42 U.S.C. § 1983, and, if so, whether such suits may reach whether state law bearing on the trust land has been obeyed?

PARTIES BEFORE THIS COURT

Petitioners are present or former officials of the State of Hawaii who now face further litigation in the federal district court for the district of Hawaii as a result of the partially adverse order of the court of appeals in this action. Petitioner William W. Paty is, and has been since December 1986, the Chairman of the Board of Land and Natural Resources of the State of Hawaii. The caption of the complaint below identified Mr. Paty as "WILLIAM W. PATY, individually and as Chairman of the Board of Land and Natural Resources of the State of Hawaii." At various times from 1986 through 1989, Petitioners Apaka, Kealoha, Ing, Arisumi, and Arata served as members of the Board of Land and Natural Resources of the State of Hawaii. The caption of the complaint below identified these petitioners by listing their names and including the words "individually and as Members of the Board of Land and Natural Resources of the State of Hawaii." Petitioner Waihee is, and has been since December 1986, the Governor of Hawaii. The caption of the complaint listed Mr. Waihee as "JOHN WAIHEE, individually and as Governor of the State of Hawaii." All petitioners appear here in their individual capacity, as that is the capacity in which they have been prejudiced by the Ninth Circuit judgment.

Respondents, plaintiffs in the District Court, include Dr. Nui Loa Price, aka Maui Loa, identified in the Complaint "individually and in his capacity as chief of the Hou Hawaiians"; the Hou Hawaiians, a native Hawaiian organization; and Kamuela Price who is captioned in the

PARTIES BEFORE THIS COURT – Continued

complaint "individually and in his capacity as member of the elder council of the Hou Hawaiians." This Petition brings Respondents to this Court in all capacities in which they appeared below.

In the court of appeals, the judgments in favor of the State of Hawaii, and Petitioners in their official capacities, were affirmed, as were those in favor of The Honolulu Sailors' Home Society, a Hawaii non-profit corporation, HFSL Corporation, a Hawaii corporation doing business as Harbor Associates, Peter S. Smith, doing business as Smith Development Corporation; Glenn K. Okada, doing business as G.K.O. Corporation, and HonFed Bank, a federal savings bank. Petitioners believe that these parties have no direct interest in the outcome of this Petition and, pursuant to Rule 12.4, are not deemed parties in this Court. A separate written notice of this determination by Petitioners is being forwarded to the Court in connection with this Petition, with service to these remaining parties as Rule 12.4 requires.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners William W. Paty, Herbert K. Apaka, Jr., Moses W. Kealoha, J. Douglas Ing, John Arisumi, Herbert Arata, and John Waihee, who are officers or former officers of the State of Hawaii, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on July 11, and as amended on August 8, and September 18, 1991.

Petitioners suggest that, in light of the principles enunciated in this Court's summary reversal in *Hunter v. Bryant*, 112 S. Ct. 534 (U.S. Dec. 16, 1991), the Court may wish summarily to grant this Petition, vacate the adverse

judgment of the Ninth Circuit remanding this case in part to the District Court, and remand for further consideration in light of the decision in *Hunter v. Bryant, supra*. As argued below, *Hunter* bears directly upon Question 1 of this Petition.

Petitioners advise the court that, in light of the pendency of *Suter v. Artist M.*, No. 90-1488 (U.S. cert. granted May 13, 1991), which may relate to the third Question Presented in this Petition, the Court may wish to hold this case pending *Suter*.

OPINIONS BELOW

The opinion of the Ninth Circuit, as amended, is reported at 939 F. 2d 702, and is reprinted in Appendix ("App.") "A".

The District Court's Order Granting Defendant's Motion to Dismiss is not reported and is reprinted in App. "B."

The Findings of Fact and Conclusions of Law and Judgment of the Circuit Court for the First Circuit, State of Hawaii, in *In re Honolulu Sailors' Home Society*, No. 28078 (Haw. Cir. July 2, and 14, 1969), are not reported and appear in App. "F."

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered July 11, 1991, and a timely petition for rehearing by Petitioners was filed on July 25, 1991. A response to the petition was called for and, after the response was filed, the petition was denied on October 30, 1991. *See* App. "C." The time in which this

Petition may be filed thus extends to and includes January 28, 1992, and this Petition is timely. Jurisdiction in the District Court was alleged to have been conferred by 28 U.S.C. §§ 1331 and 1343. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1983 of Title 42 of the United States Code provides that

> Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation or any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 5 of the Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4, 6 (1959), provides in pertinent part that

> (a) Except as provided in subsection (c) of this section, the State of Hawaii and its political subdivisions, as the case may be, shall succeed to the title of the Territory of Hawaii and its subdivisions in those lands and other properties in which the Territory and its subdivisions now hold title.
>
> (b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission

into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

(c) Any lands and other properties that, on the date Hawaii is admitted into the Union, are set aside pursuant to law for the use of the United States under any (1) Act of Congress, (2) Executive order, (3) proclamation of the President, or (4) proclamation of the Governor of Hawaii shall remain the property of the United States subject only to the limitations, if any, imposed under (1), (2), (3), or (4), as the cases may be.

(d) Any public lands or other public property that is conveyed to the State of Hawaii by subsection (b) of this section but that, immediately prior to the admission of said State into the Union, is controlled by the United States pursuant to permit, license, or permission written or verbal, from the Territory of Hawaii or any department thereof may, at any time during the five years following the admission of Hawaii into the Union, be set aside by Act of Congress or by Executive order of the President, made pursuant to law, for the use of the United States, and the lands or property so set aside shall, subject only to valid rights then existing, be the property of the United States.

(e) Within five years from the date Hawaii is admitted into the Union each Federal agency having control over any land or property that is retained by the United States pursuant to subsections (c) and (d) of this section shall report to the President the facts regarding its continued need for such land or property and if the President determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii.

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands

> retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e) together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

STATEMENT OF THE CASE

In admitting our Fiftieth State to the Union on "an equal footing" with the remaining States, Congress returned to the control of the people of Hawaii, through their new State government, more than 1.3 million acres which are known as Hawaii's "public trust lands." More than 30 years later, despite the federal doctrines that render a State's management of its own lands of only local concern, the state officials charged with administering these lands now face the threat of pervasive federal regulation by a host of private litigants, in so-called "breach of trust" suits under 42 U.S.C. § 1983 to "enforce" § 5(f) of the Admission Act. That latter statute provides only that the trust lands are to be used for "one or more" purposes, defined broadly to include any provision of

land "for public use" as "the constitution and laws" of Hawaii "may provide." The sole stated remedy for use of 5(f) lands "for any other object" is a suit "by the United States."

This case concerns a particularly disturbing application of § 1983 as an engine for review of state land management practices. The particular facts out of which this case arises concern a grant of land by the Republic of Hawaii nearly a century ago to a private charitable organization, the Honolulu Sailors Home Society. Because the Republic's original grant contained an express provision that if "any part" of the land conveyed "shall at any time cease to be used for the purpose of a Sailor's Home, the whole of said lot shall forthwith revert to the Government," Pet. App. 55, the grantee repeatedly took steps to seek the guidance of Hawaii's courts as modern conditions, including the development of thirty-story skyscrapers and condominium development regimes, have required interpretation of the grantor's intent. In actions for instructions, the state circuit court, with the Attorney General as a party present to enforce the grant, in 1960, 1966, and 1969, approved projects for upgrading the Sailor's Home in exchange for transfer to private developers of development rights and real estate prerogatives that, for technological, economic, and legal reasons, simply did not exist in 1893.

Despite this history, the United States Court of Appeals for the Ninth Circuit, applying a series of expansive decisions allowing private suits to enforce § 5(f) by way of 42 U.S.C. § 1983, reversed and remanded a District Court judgment dismissing claims that the Governor, and

Chairman and Members of the Board of Land and Natural Resources of the Sate of Hawaii, not only breached federal law in refusing, despite these state court actions, to "recover" the land granted by the Republic, but are liable in their own personal capacities for "losses" allegedly occurring over a course of decades by reason of the State's asserted failure to oust the Society from its small downtown Honolulu parcel. Although the Ninth Circuit found the principles underlying Respondents' federal claim, on their merits, were "subject to debate," "not entirely clear," and "problematic to say the least," it remanded Petitioners, over their vigorous invocation of qualified officer's immunity, to yet another round of litigation in the District Court. Whether the Ninth Circuit (1) properly applied this Court's precedents dictating dismissal of just such novel claims under the "protective" doctrine of qualified immunity; (2) even properly had individual capacity claims before it; and (3) improperly extended the reach of 42 U.S.C. § 1983 as a vehicle for enforcing those sensitive federal statutes – the States' admission acts – by which the Union itself exists, are the issues presented by this Petition.

A. Background of the Litigation.

In 1893, before the annexation of Hawaii to the United States, the government of the Republic of Hawaii, through its minister of interior, J. A. King, transferred a parcel of land consisting of approximately 30,000 square feet in downtown Honolulu to the Honolulu Sailor's Home Society. The deed states, among other conditions, "that the premises herein conveyed shall be used only for the purposes and uses of a Sailor's Home . . . equally available to the sailors of all nations, [and] that if the

herein described lot or any part thereof shall at any time cease to be used for the purposes of a Sailor's Home, the whole of said lot shall forthwith revert to the Government of the Hawaiian Islands." *See* Pet. App. 55. Upon annexation, and, later, statehood, the Territory, and then State, of Hawaii succeeded to the reversionary interests created by the deed.

In 1960, with the price of real estate in Hawaii rising, the Society, as a charitable organization, petitioned the Circuit Court for the First Circuit, State of Hawaii, for instructions to determine if it could generate income from the land without triggering a right of re-entry so long as a substantial portion of the premises were left as actual facilities for the sailor's home. On June 27, 1960, the Circuit Court held that it could, decreeing that Sailors' Home Society had "discretion not only in the manner of constructing a new building on the premises," "but also in additional and different use of said premises by leasing office space or shops without effecting a termination or forfeiture of the grant of said premises so long as said premises are also used for the purposes of said Society and for the use of sailors, including actual physical use of a substantial portion of the building for sailors." Findings of Fact and Conclusions of Law ¶ 3, *In re Honolulu Sailors' Home Society*, No. 28078 (Haw. July 14, 1969) [*Sailors' Home III*], Pet. App. 60.

Six years later, the Society sought further guidance concerning a "project contemplated by Trustees [of the Society] and Alakea Properties, Inc. wherein there is reserved to the Trustees a five-story building consisting of approximately 13,320 square feet." *Id.* ¶ 4, Pet. App. 60-61. The state circuit court held that such a use "does constitute an actual physical use of a substantial portion

of the premises for sailors within the meaning of the Judgment entered in this Court on June 27, 1960, in Civil # 6182." *See id.*

In 1969, in yet a third instructions proceeding, the Trustees of the Society received permission to go ahead with yet another development alternative, this time "compris[ing] of a proposed development contract between the [Society] and Harbor Properties, Ltd., a Hawãii Limited partnership." *Id.* ¶ 5. In exchange for allowing Harbor Properties, and Puget Pacific to take a leasehold of the original premises, Alakea Properties would provide to the Society sufficient revenue to develop a new Sailors' Home on an adjacent parcel "for use as the Honolulu Sailors' Home pursuant to the purposes of [the Society]." *Sailors' Home III*, Findings ¶ 6, Pet. App. 61. The court held that the development plan would provide to the Society a new "Sailors' Home Society condominium apartment" "free and clear" of all encumbrances, including mechanics and materialmen's liens, except for "the terms of the original grant" and a horizontal property regime declaration required to be filed pursuant to Hawaii law. *Id.* ¶¶ 7, 8. The Circuit Court found this proposal "fair, just and reasonable," and "an actual physical use of a substantial portion of the premises [demised in 1893] for sailors within the meaning of the Judgments entered in Civil Nos. 6182 and 18,531." *Sailors' Home III*, Conclusions ¶¶ 1 & 2. Accordingly, the Court determined that "in the event of a forfeiture to the State of Hawaii pursuant to the terms of the original grants, as now or hereafter modified, where caused without fault of the developer or Lessee, or those claiming by, through, or under the same, such forfeiture would be subject to the proposed lease, development contract and

Declaration of Horizontal Property Regime." *Sailors' Home III* Conclusions ¶ 3, Pet. App. 62-63; *see also Sailors' Home III* Judgment at ¶¶ 1-3, Pet. App. 64-67. In all three *Sailors' Home* proceedings the Attorney General, as the representative of the public interest in enforcement of the terms of charitable grants, was a party of record and appeared in the case. *Id.*

B. Proceedings Below.

More than twenty years after the litigation in *Sailors' Home III* concluded, Respondents commenced this action on July 21, 1989, in the federal district court in Honolulu. While conceding that the 1969 development proposal provided more than 8,000 square feet of condominium space for the Sailors' Home Apartment (complaint ¶ 18; Pet. App. 44), Respondents alleged that because "no portion of the Subject Property [the originally granted land] is being used as a sailors' home" (*id.* ¶ 22), "the right to possession of the Subject Property reverted by operation of law to the State of Hawaii, in trust as set forth in § 5(f) of the Admission Act, on or about October 3, 1969, when Defendant HSHS leased the Subject Property for purposes other than a sailors' home" (*id.* ¶ 29). Respondents therefore alleged that, since October 3, 1969, "Defendant HSHS and the Developers have wrongfully received rents, issues and profits from the subject property" and that "[s]aid rents, issues and profits rightfully belong to the beneficiaries of the 5(f) trust" (*id.* ¶ 37). Among other remedies, Respondent sought federal judicial determination of "all adverse claims" of various private defendants, including the Society, its lessees, their partners and mortgagees, and their successors in interest (*id.* at 14, ¶ B). In

this regard, Respondents sought a federal judicial declaration rendering Hawaii, despite intervening property interests, the owner of the originally granted land "in fee simple absolute," and declaring the private defendants without "estate, right, title, lien or interest in or to said property or any part thereof." Respondents also sought an injunction against the private defendants that would bar them "from asserting any claim whatever in or to said property adverse to the trustee, State of Hawaii," as well as a "judgment against all Defendants, jointly and severally, in the amount of all rents, issues and profits, wrongfully received by Defendant HSHS and the Developers from the subject property since October 3, 1969." *Id.* at 14-15, ¶¶ C, D, and E, Pet. App. 52-53.

Section 5(f) of the Admission Act, to which the complaint referred, governs the administration of Hawaii's public trust lands. These lands were originally transferred to the United States by the Republic of Hawaii via the Joint Resolution of Annexation, 30 Stat. 750 (1898), and, with certain enumerated exceptions, were to have been held by the United States "for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Id.* Under the Organic Act, which structured Hawaii's territorial government, the local government was granted authority to "maintain, manage, and care for" lands not reserved for national purposes, and directed the national government to turn over to the local government, for such uses as "public works," "or other public purposes," consideration earned upon disposition of the public lands. § 91 of the Act of April 30, 1900, 31 Stat. 141 (1900).

Section 5(f), which reaffirmed, at the time of Statehood, the authority of Hawaii's local government to deal

with trust property, provides specifically that lands (1) whose title was not already in the Territory and to which the State, for that reason, did not succeed under § 5(a) of the Admission Act, and (2) which were returned under §§ 5(b)-(e) of the Act, were granted in fee to Hawaii for disposition for "one or more" of five purposes. These enumerated purposes are: (1) "support of the public schools and other public educational institutions"; (2) "betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended"; (3) "development of farm and home ownership on as widespread a basis as possible"; (4) "making of public improvements"; and (5) provision of lands for "public use." § 5(f), 73 Stat. at 6. Congress noticeably did not state that a disposition in violation of § 5(f) would be "null and void." *Cf.* New Mexico-Arizona Enabling Act, 36 Stat. 557, 575 (1910), *quoted, ASARCO Inc. v. Kadish*, 490 U.S. 605, 627 (1989). Moreover, Congress did not subject "public property" other than "public lands" to any of the strictures of § 5(f). Cf. § 5(a), 73 Stat. 6.

Congress's prescribed remedy for a failure to manage and dispose of land reverting under §§ 5(b)-(e) "for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide" is a "suit . . . brought by the United States" for "breach of trust." 73 Stat. at 6. As Judge Wallace, writing for the Ninth Circuit in *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission*, 588 F.2d 1216, 1223 (9th Cir. 1978) ("*Keaukaha I*"), stated, the legislative history lacks "any indication that Congress intended to create a private cause of action via the Admission Act," and "by providing a specific remedy, Congress intended to exclude others." *Id.*

Respondents' claims were all dismissed in the District Court on motions to dismiss, or for summary judgment, brought by the State defendants, and motions to dismiss brought by the private defendants. *See* Pet. App. B. In its written order, entered December 7, 1989, the District Court did not, however, accept Petitioners' contentions that 42 U.S.C. § 1983 enforcement had been precluded in this context, relying upon an expansive reading of the Ninth Circuit's 1984 decision in *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission*, 739 F.2d 1467 (9th Cir. 1984), to sustain Respondents' invocation of § 1983. *See* Pet. App. B at 30. Nonetheless, the District Court granted complete relief to all defendants, holding that the State had not waived its Eleventh Amendment immunity and therefore was not a proper party (*id.* at 24-25), and that the Eleventh Amendment was a bar to Respondents' "official capacity" claims, in that Respondents sought "a basis upon which to recover monetary relief" (*id.* at 25-28 (citing *Papasan v. Allain*, 478 U.S. 265 (1986), and *Green v. Mansour*, 474 U.S. 64 (1985)). The Court concluded that the complaint had not stated claims against the state officials in their individual capacities, in that the state officials "performed th[e alleged] acts and made th[e alleged] omissions within their capacity as state officers" (*id.* at 28). In light of this ruling, it was not necessary for the District Court to reach Petitioners' arguments that immunity was dictated by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).[1] The District

[1] Although the Ninth Circuit held that the issue of *Harlow* immunity was not raised by Petitioners' motion, this is not precisely true. Although the State Defendants' initial motion

(Continued on following page)

Court dismissed the private defendants on the basis of inadequate allegations of state action (*id.* at 31), and the

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papers did not cite to *Harlow*, an answer had been previously filed which plainly preserved the immunity defense, and *Harlow* immunity was plainly advanced as an additional ground for dismissal or summary judgment in a supplemental memorandum filed well in advance of the due date for Respondents' opposition in the District Court. After extensively identifying defects in the merits of Respondents' claims, *see* Supp. Mem. in Support of State Def. Motion to Dismiss Complaint and Action, or in the Alternative, Summary Judgment at 13-24 (D. Haw. filed Sept. 29, 1989), Defendants invoked *Harlow* immunity quite specifically:

> In *Harlow v. Fitzgerald*, 457 U.S. 800, 808 (1982), the United States Supreme Court, quoting *Butz v. Economou*, 438 U.S. 478 (1978), stated in pertinent part:
>
> > Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibility of artful pleading. Unless the complaint states a compensable claim for relief . . . , it should not survive a motion to dismiss. Moreover, the Court recognized in *Scheuer* that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by friv[ol]ous lawsuits." 438 U.S. at 507-08 (citations omitted).
>
> Because neither the Joint Resolution of Congress of July 7, 1898 nor the Hawaii Admission Act has

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lack of "pendent-party" subject matter jurisdiction (*id.* at 34).

On appeal, the Ninth Circuit affirmed in part, and reversed and remanded in part. Although the court affirmed the entry of judgment in favor of the private defendants (and, indeed, upheld a post-judgment order awarding sanctions), Pet. App. 14, 16, and also affirmed, in light of the Eleventh Amendment's bar, the denial of Respondents' "official-capacity" claims, *id.* at 8, the court rejected in part, and deferred in part, Respondents' arguments for affirmance as to any "individual capacity" claims for damages. Relying upon its holding in *Keaukaha II, supra,* the court first held that "an action under 42 U.S.C. § 1983 is proper" to enforce § 5(f) in this context (*id.* at 7).

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> any relevance to this action, there is no substantial federal question presented for the Court's consideration. Even a cursory examination of the complaint in this case demonstrates that Plaintiffs' allegations are unsound, unrealistic, and fanciful. Plaintiffs disregard the clear language of the statutes in issue. Under these circumstances, the Court should grant the State Defendants' motion to ensure that the State of Hawaii and the State officials named in this suit are not harassed by meritless litigation.

Id. at 24-25.

As is urged below, although the Ninth Circuit's reading of the record in this regard is plainly wrong and merits correction, its error in identifying the grounds argued before the District Court is not ultimately necessary to granting review. The Ninth Circuit acknowledged that the issue had been raised as an alternative ground of affirmance and was preserved appropriately in Defendants' answer. *See* Pet. App. 8-9.

The panel next overruled Petitioners' arguments that individual capacity claims had not been stated by the complaint, holding that "appellants could bring their action under section 1983 against the state officials' in their individual capacities, even if those officials were performing their governmental duties when they committed the alleged wrongs" (*id.* at 8). Finally, the panel denied our request for affirmance based on qualified immunity as elaborated by *Harlow* and its progeny (*id.* at 9-10).

On this latter issue, the panel held that, to defeat immunity, respondents "must show that the law supporting the following chain of reasoning was clearly established," namely, "that the State's interest was an interest in land, that the land reverted to the State when the 1969 transaction was consummated, and that the failure to collect revenues from the land since that time resulted in a violation of section 5(f) of the Act." Pet. App. 9-10. While the panel observed that the points of law on which Respondents would have to rely to overcome immunity were "subject to debate," "not . . . entirely clear," and "problematic to say the least," and stated that it had "serious doubts that the plaintiffs can overcome the difficulties involved in showing that, objectively speaking, the officials violated clearly established legal principles," the panel nonetheless reversed and remanded because "immunity is an issue that should first be addressed by the trial court." *Id.* (citing *Harlow*, 457 U.S. at 819-20). Although Petitioners, in a petition for panel rehearing, strongly urged that this disposition was contrary to this Court's ruling in *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), the panel, while calling for a response to the petition,

ultimately did not alter its ruling, and remanded Petitioners to the District Court for determination of the immunity issue and other defenses.

REASONS FOR GRANTING THE WRIT

The decision below presents three important, recurring issues that merit review, and, ultimately, reinstatement of the judgment in favor of the state officials. At the forefront is the panel's failure to heed this Court's admonitions against needless deferral of "purely legal question[s]" underpinning the defense of qualified immunity. *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991). Particularly in light of this Court's recent summary reversal in *Hunter v. Bryant*, 112 S. Ct. 534 (Dec. 16, 1991), the judgment remanding Petitioners for yet another round of litigation in the trial court is wrong and should be reversed. As in *Hunter*, the court of appeals, without good reason, overlooked the "repeatedly . . . stressed importance of resolving immunity questions at the earliest possible stage in litigation." *Id.* at 536. Here, the court of appeals found, as it had to, that the principles necessary to Respondents' claims were at the least "subject to debate," "not entirely clear," and "problematic." This dictated immunity, not a remand, and, as in *Hunter* the panel judgment must be reversed. At the least the Court should grant the writ, vacate the judgment, and remand for further review in light of *Hunter*.

Second, the court of appeals overlooked that personal capacity relief had not even been properly sought. As this Court has already noted, there is a recurring conflict in the courts of appeals concerning the notice that must be given of such intrusive claims. *See Hafer v. Melo*, 112 S. Ct. 358, 361 n.* (1991). The judgment in this case,

allowing an individual capacity claim to go forward merely on the basis of the use of the word "individually" in the caption starkly presents (and, indeed, exacerbates) this conflict. *See infra* pp. 22-24.

Third, the court of appeals' drastic expansion of § 1983 liability to any claim concerning the propriety of Hawaii's administration of its potential interests in land compellingly counsels review. The expansive federal judicial role in managing Hawaii's public trust lands (and those lands that might be brought into the trust) charted by the court below portends the imposition of intrusive federal judicial oversight, at the behest of any private litigant with an interest in state land management, over trust lands across the Western United States.[2] Like the judgment in *Suter v. Artist M.*, No. 90-1488 (U.S. cert. granted May 13, 1991), this case raises at the least whether "courts may create rights [under 42 U.S.C. § 1983] from congressional silence only after reviewing the statute, [and] its legislative history . . . to determine

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[2] *See* Brief Amicus Curiae of the States of Alabama, Alaska, Idaho, Indiana, Missouri, Nevada, Oklahoma, Oregon, and Wyoming at 6, 14-17, *Paty v. Napeahi*, No. 90-1937 (U.S. filed Aug. 26, 1991) (noting that in § 5(f) cases "the Ninth Circuit has fundamentally misapplied this Court's doctrines that permit federal statutes to be enforced in limited circumstances under 42 U.S.C. § 1983" and expressing concern that Ninth Circuit's reasoning, if accepted by other courts, could lead to expansive federal intrusions into state land management practices in numerous states); *id.* at 3-4 nn. 2-3 (noting that seven States other than Hawaii in the Ninth Circuit have public trust conditions attached to conferred lands, and that, outside the Ninth Circuit, 19 other admission acts have such conditions).

whether the statute is sufficiently mandatory and specific to evince a congressional intent to create privately enforceable rights," Pet. for Cert. at 6-7, No. 90-1488 (U.S. filed Mar. 20, 1991). Indeed, this case presents perhaps the most forceful instance where remedies under 42 U.S.C. § 1983 should not be deemed intended. Standing alone, § 5(f) requires only that trust lands be made available "for public use," an amorphous standard "coterminous with the scope of a sovereign's . . . powers." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984). Likewise if the judgment rests on "the constitution and laws" of Hawaii referred to in § 5(f), the decision below is also flawed, for "there is no authority anywhere supporting the proposition that a state [law] becomes a federal law merely by virtue of its inclusion in a state plan required by federal law." *Oberlander v. Perales*, 740 F.2d 116, 119 (2d Cir. 1984). Indeed, given the history of the Admission Act, the lack of any federal support of Hawaii's efforts to meet its trust tasks, and the provision of a specific remedy in the statute itself, the judgment below violates both parts of this Court's two-part test to determine if statutory provisions are enforceable under 42 U.S.C. § 1983. *See, e.g., Dennis v. Higgins*, 111 S. Ct. 865, 871 (1991); *Wilder v. Virginia Hospital Association*, 110 S. Ct. 2510, 2517 (1990). And, unlike other cases where the Court may have had concern that the question was not properly presented for review, *see Paty v. Napeahi*, 112 S. Ct. 278 (U.S. Oct. 7, 1991), Respondents concede the issue of § 1983 enforceability is properly presented, and, "[i]f the issues raised in the petition are important enough to warrant certiorari, [the writ] should be granted in the case of *Price v. Sailors Home Society*." Brief of Amici Curiae, Hou Hawaiians, et al., No. 90-1937 (U.S. filed Aug. 23, 1991). The

questions presented here clearly meet this test, and review should thus be granted.

I. As Demonstrated by this Court's Recent Summary Reversal In *Hunter v. Bryant*, No. 90-1440 (U.S. Dec. 16, 1991), Review Should Be Granted to Correct the Ninth Circuit's Erroneous Deferral of Petitioners' Entitlement to Qualified Immunity.

As this Court held in *Hunter v. Bryant*, 112 S. Ct. 534 (Dec. 16, 1991) (per curaim), this Court's decisions interpreting the "protective" doctrine[3] of qualified immunity "repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in the litigation." *Id.*; *see also Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991).

The decision here undermines this rule by remanding Petitioners to yet another round of litigation in the District Court, and then, undoubtedly, on appeal. Although the panel did not suggest immunity was a jury issue (*see* 112 S. Ct. at 536), the panel nonetheless failed to fully implement the standard for granting summary judgment on qualified immunity. *Id.*

In its analysis, the panel below identified no fewer than three predicate legal propositions, *each* of which Respondents would have to show were "clearly established" in the "particularized sense" (*see Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) *Harlow* requires. *See* Pet. App. at 9-10. Thus, if it were not clearly established that (a) the contingent interest held by Hawaii at the time of Statehood was not "land" within the meaning of § 5(f),

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[3] See *Burns v. Reed*, 111 S. Ct. 1934, 1944 (1991) (referring to the objective standard for qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), as a "protective one.").

but rather was "other property," as described in § 5(b) of the Act, to which the strictures of § 5(f) are inapt; *or* that (b) the State's interest was not such that it was required to take action to recover the property; *or* that (c) allowance of the Sailors' Home Society's free use of the property, even if title lay (or could have been found to be) in the State, was not a violation of the "one or more" provisions of § 5(f), Respondents' claims would fail. As the panel effectively found, however, there was no possible way Respondents could overcome immunity. As the panel held, each of these issues was "a matter subject to debate," "not . . . entirely clear," or "problematic to say the least." Pet. App. 9-10. Nonetheless, the panel reversed the District Court's dismissal.

As *Hunter* emphasizes, this is error, and a writ should issue. Indeed, the legal points on which Respondents' claims must turn do not raise just "serious doubts" whether immunity can be overcome. Rather, they establish the very predicates that *dictate* immunity. As in *Hunter*, Petitioners are "entitled to qualified immunity because their decision [not to take action to oust the Sailors' Home Society] was reasonable, even if [arguendo, it was] mistaken." 112 S. Ct. at 536. Indeed, given the *res judicata* bar in *favor* of the Society (*see supra* pp. 7-10), Petitioners, all of whom came into office long after those judgments entered, likely had no lawful choice *except* to do what they did. Moreover, neither Respondents nor the panel have any answer to Petitioners' right, under Hawaii law, to permit the Society to retain its grant rent-free even if the State did own the land. *See* Haw. Rev. Stat. § 171-43.1.[4]

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[4] That law provides that "[t]he board may lease, by direct negotiation and without recourse to public auction, public

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Under these circumstances, the panel abused its ordinary discretion to remand issues not ruled upon expressly by the District Court (*see, e.g., Dandridge v. Williams*, 397 U.S. 471, 476 n.6 (1970)).[5] As *Hunter* reiterates, Petitioners' entitlement " 'is an *immunity from suit* rather than a mere defense to liability,' " 112 S. Ct. at 536, and should not have been postponed. The Court should grant the writ of and reverse the adverse judgment below or grant plenary review. As the Ninth Circuit panel did not have *Hunter*'s benefit, however, the Court may wish to grant the petition, vacate the judgment, and remand for further consideration in light of *Hunter v. Bryant*.

II. This Court Should Grant Review to Correct the Ninth Circuit's Assumption, which Directly Conflicts with That of Other Circuits, that Individual-Capacity Relief Was Sought.

To even reach the point of remanding this case, the Ninth Circuit was required to hold that, in fact,

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lands to an elemosynary organization which has been certified by the director of taxation to be tax exempt under section 235-9(a)(2)." Nothing in this law requires that there be a "fair-value" exchange or any monetary consideration at all.

[5] The panel also postponed Petitioners' defenses based upon the statute of limitations as well as *res judicata*, collateral estoppel, *Rooker-Feldman* (*see District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)), and proximate cause (*see Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981)). While not conceding that this was proper, Petitioners do not seek reversal of these postponements as these defenses do not share the same character as the doctrine of qualified immunity. Petitioners, of course, preserve their rights to proceed in the trial court as to all defenses left open by the mandate below.

individual-capacity relief had been properly sought from Petitioners. Over Petitioners' strong objections (*see* Hawaii Officials' Ans. Br. at 39-42, No. 90-15117 (9th Cir. filed June 11, 1990); Hawaii Officials' Supp. Ans. Br. at 32-33, No. 90-15117 (9th Cir. filed Apr. 1, 1991)) the Ninth Circuit not only held that Respondents "could bring their action under section 1983 against the state officials in their individual capacities" (Pet. App. 8), but necessarily ruled that Respondents *did* so bring their action.

The judgment here adds to and exacerbates the recurring inter-circuit conflicts as to the specificity by which a complaint must plead individual capacity claims. In the Seventh Circuit, for example, there is "a presumption that a section 1983 claim against a public official is an official-capacity suit." *See Conner v. Reinhard*, 847 F.2d 384, 394 n.8 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988). This presumption, here, would have required dismissal, for Respondents adduced no evidence that the Petitioners were even *served* as required for an individual capacity claim. Indeed, Plaintiffs did not seek damages in any meaningful sense. *Cf. Conner*, 847 F.2d at 394 n.8. At most, Plaintiffs sought, from "all Defendants, jointly and severally," a judgment "in the amount of all rents, issues, and profits, wrongfully received by Defendant HSHS and the Developers from the subject property since October 3, 1969" (Pet. App. 53), a restitutionary remedy reaching back years before Petitioners took office. This plainly shows relief was objectively sought only from Petitioners' offices, i.e., the State, and not Petitioners personally. Merely attaching the word "individually" to the Complaint's caption would not be enough in the Seventh Circuit. It sufficed in the Ninth.

Indeed, under *Price v. Akaka*, 928 F.2d 824 (9th Cir.), *cert. denied*, 112 S. Ct. 436 (1991), which was determinative of the issue here (*see* Pet. App. 8), plaintiffs are presumed to have named state officers in their individual capacities whenever damages are sought, for to hold otherwise "would have been inconsistent with the very nature of [their] claim" in light of the Eleventh Amendment. *See* 928 F.2d at 828, *cited*, Pet. App. 8. This individual-capacity-suit presumption is at plain odds with that of the Seventh Circuit, and, *a fortiori* at odds with those of the Sixth and Eighth Circuits, which use "more rigid pleading requirement[s]." *Hafer v. Melo*, 112 S. Ct. at 361 n.*.

These conflicts go to the essence of what is required to put a state offical on proper notice, and should be resolved. They implicate not only due process concerns, *see Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), but also, so far as pleading around the Eleventh Amendment is necessary, subject matter jurisdiction. On this front, Fed. R. Civ. P. 8(a) requires a "short and plain statement of the grounds upon which the court's jurisdiction depends," a requirement that ought to counsel specificity in naming the capacity in which a state offical is sued. Indeed, this Court has long held that subject matter jurisdiction must "appear[] affirmatively from the record." *King Bridge Co. v. Otoe County*, 120 U.S. 225, 226 (1887). The presumption below in favor of individual-capacity claims is contrary to this rule, and certiorari should issue.

III. Review Should Be Granted to Correct the Court of Appeals' Expansive Reading of 42 U.S.C. § 1983 for Enforcement of the States' Trust Duties Under Their Admission Acts.

In holding, over Petitioners' objections, that "an action under 42 U.S.C. § 1983 is proper" to enforce § 5(f)

of the Admission Act in this context (Pet. App. 8), the Ninth Circuit left Petitioners and other Hawaii officials no room but to seek review in this Court as to the important question whether the § 1983 provides a remedy to enforce conditions, contained in State admission acts, upon the newly admitted States' public trust lands. Indeed, viewing the issue as "long . . . settled," the court of appeals chastized Petitioners for even raising the issue in light of this Court's narrow rationale in decisions such as *Wilder v. Virginia Hospital Ass'n*, 110 S. Ct. 2510 (1990), or *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1986), which had been handed down long after the Ninth Circuit's original ruling, in *Keaukaha II*, 739 F.2d 1467 (9th Cir. 1984), which extended § 1983 to the unique provisions of section *four* of the Admission Act and the Hawaiian Homes Commission Act. *See* 739 F.2d at 1471-72.

The allowance of § 1983 suits to enforce the Admission Act with respect to all 5(f) lands presents questions which this Court should review. Indeed, even before § 1983 enforcement arises, it is dubious whether this case presents a federal question at all, for federal quiet-title actions, as Respondents would have here, are unavailable, as "a suit involving rights to land acquired under a law of the United States" does not "arise under" federal law, for, if it did, "every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws." *Shulthis v. McDougal*, 225 U.S. 561, 569-70 (1912).

The issue here is, at a minimum, as compelling as those in *Suter v. Artist M.*, No. 90-1488 (U.S. cert. granted May 13, 1991). Worded more broadly than the Adoption Assistance Act, § 5(f)'s "public use" clause allows action

to and including the limit of the State's constitutional power, and does *not* require obedience to "an 'objective benchmark' of an 'efficiently and economically operated facility,' " Pet. for Cert. at 14, No. 90-1488 (quoting *Wilder v. Virginia Hospital Ass'n*, 110 S. Ct. 2510, 2522-23 (1990)). Rather, " 'whether in fact the [state's action] will accomplish its objectives is not the question.' '" *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984). It is obvious that the Sailor's Home Society is carrying out legitimate public welfare purposes, long recognized to be the source of state largesse. *Cf. Bowen v. Kendrick*, 487 U.S. 589, 609 (1988) (noting "the long history of cooperation and interdependency between governments and charitable or religious organizations"); *Hawaii Housing Authority*, 467 U.S. at 243-44 ("that property . . . is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose"). The broad discretion in the literal language of § 5(f) belies the notion that Congress intended to create "enforceable rights" in private individuals who may, upon any particular disposition, be beneficiaries of the land. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 614-15 (1989) (Kennedy, J., joined by Rehnquist, C.J., and Stevens and Scalia, JJ.).

Section 5(f) is likewise bereft of "legislative history indicating Congress's intent to create specific, enforceable rights." *See* Pet. for Cert. at 15, No. 90-1488 and 588 F.2d at 1223. As did the Seventh Circuit's ruling with respect to Title IV-E of the AAA, that here "creates enforceable rights on behalf of a class of citizens for whom [Hawaii] receives not one dollar of federal reimbursement." Pet. for Cert. at 19, No. 90-1488. Needless to say, Congress did not, and has not, provided appropriations to support programs to assure that land management decisions in

Hawaii maximize revenue to the detriment of any private party which may be living upon 5(f) trust land.

Although one prudent option is to hold this Petition pending decision in *Suter v. Artist M.*, review should be granted here regardless of the outcome in that case, because the present expansion of § 1983 raises issues that are qualitatively more disturbing than any of the previous challenges raised by States to invoking § 1983 as a means to enforce federal statutes. For in perhaps no other area has state sovereignty, and the freedom from federal interference, been more jealously guarded by this Court than with respect to the grants of title to those lands that literally make the newly admitted States what they are.

As this Court emphasized in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987), when burdens are sought to be implied upon a State's title to lands conveyed upon its admission, "the strong presumption is against finding an intent to defeat the State's title," and, thus, a court "cannot infer that Congress intended to defeat a future State's title" " 'unless the intention was definitely declared or otherwise made very plain.' " *Id.* at 201-02. While, superficially, Respondents seek to "add to," rather than "defeat" State title, fundamental notions of property as a set of entitlements to, or immunities from, judicial interference render *Utah* apt. As the Court observed in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1984), the rule is "that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Id.* at 475. The decision below threatens this principle.

While § 1983 suits to enforce federal statutes are allowed unless "(1) 'the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983,' or (2) 'Congress has foreclosed such enforcement in the enactment itself,'" *Wilder*, 110 S. Ct. at 2517, this Court has always applied this test in light of the principles at stake in the particular context at issue. By ignoring considerations of state sovereignty and federalism, the Ninth Circuit has misinterpreted this Court's precedents under both prongs of their analysis.

Thus, in ascertaining whether a statute confers "enforeable rights," this Court has found it critical whether Congress has "condition[ed] federal funding on compliance" with the directive at issue. *Wilder*, 110 S. Ct. at 2518. Nothing in § 5(f) suggests that 5(f) land could revert to the United States even in a suit brought by the United States under its enforcement power. Even more so than in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), § 1983 enforcement was not, and should not be deemed, intended, since Congress has provided *no* appropriations "to meet the enormous financial burden" of assuring that the 5(f) corpus is "correctly" administered. *Wilder*, 110 S. Ct. at 2510 n.10. Likewise, in determining whether the rights at stake were "'too vague and amorphous' to be beyond the competence of the judiciary to enforce." *Wright* 479 U.S. at 431-32, the Court has recognized a "critical inquiry" (*see Wilder*, 110 S. Ct. at 2517) to be whether Congress has spoken so clearly that "we can fairly say that the state could make an informed choice" as to its actions. *Pennhurst*, 451 U.S. at 25. Hawaii's broad discretion under § 5(f) belies the notion that this factor favors enforceability. Similarly, the Ninth Circuit's own precedents undercut the notion that " 'the

provision in question "intend[ed] to benefit" the putative plaintiff,' " *Dennis v. Higgins*, 111 S. Ct. 868, 871 (1991), as the § 5(f) "does not benefit any class narrower than all citizens of Hawaii." *See, e.g.*, 588 F.2d at 1223.

While the "constitution and laws" of Hawaii referred to in § 5(f) undoubtedly provide more specific constraints on state officials, nothing in this Court's jurisprudence suggests, as would appear necessary to the judgment, that such constraints are actionable under § 1983. Indeed, as the Second Circuit has held, "there is no authority anywhere supporting the proposition that a state [law] becomes a federal law merely by virtue of its inclusion in a state plan required by federal law." *Oberlander v. Perales*, 740 F.2d 116, 119 (2d Cir. 1984).

Similarly, the Ninth Circuit's conclusion that the lack of alternative private remedies requires resort to § 1983 (see 739 F.2d at 1471) inverts the reasons for precluding § 1983 suits when Congress has done so "in the statute itself." It is anomalous to allow citizen suits to enforce the Admission Act via § 1983. *Cf. Wilder*, 110 S. Ct. at 2524 & n.19 ("Congress believed that a private judicial remedy existed before passage of the Boren Amendment"); *Wright*, 479 U.S. at 423 (to same effect), *with Keaukaha I*, 588 F.2d at 1223. The Ninth Circuit's rearrangement of Congress's careful limitation of enforcement actions to suits by the United States is a deep intrusion upon federalism principles, and should not be permitted to stand without review in this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and summarily reverse the judgment of the court of appeals adverse to petitioners on the basis of petitioners' defense of qualified immunity. Because the court of appeals did not have the benefit of this Court's decision in *Hunter v. Bryant*, 112 S. Ct. 534 (U.S. Dec. 16, 1991), the Court may wish to grant the petition, vacate the judgment, and remand for further consideration in light of *Hunter v. Bryant, supra*.

If the Court does not summarily reverse or vacate and remand, the Court should grant certiorari and set the case for plenary review. Because of the relationship of Question 3 to the issues in *Suter v. Artist M.*, No. 90-1488 (U.S. cert. granted May 13, 1991), the Court should at the least hold this petition pending the disposition in *Suter v. Artist M., supra*.

Dated: Honolulu, Hawaii, January 28, 1992.

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APPENDIX "A"

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DR. NUI LOA PRICE, aka Maui Loa, individually and in his capacity as chief of the Hou Hawaiians; THE HOU HAWAIIANS, a Native Hawaiian Ohana; and KAMUELA PRICE, individually, and in his capacity as member of the elder council of the Hou Hawaiians, *Plaintiffs-Appellants,* v. STATE OF HAWAII, WILLIAM W. PATY, individually and as Chairman of the Board of Land and Natural Resources of the State of Hawaii; HERBERT K. APAKA, JR.; MOSES W. KEALOHA; J. DOUGLAS ING; JOHN ARISUMI; HERBERT ARATA, individually and as Members of the Board of Land and Natural Resources of the State of Hawaii; JOHN WAIHEE, individually and as Governor of the State of Hawaii; THE HONOLULU SAILORS HOME SOCIETY, a Hawaii non-profit corporation; HFSL CORP., a Hawaii corporation, dba Harbor Associates; PETER S. SMITH, dba	No. 90-15117 and 90-15863 D.C. No. CV-89-0561-HMF ORDER AND AMENDED OPINION

Smith Development Corp.; GLENN K. OKADA, dba G.K.O. Corp.; and HONFED BANK, a federal savings bank,

Defendant-Appellees.

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, Chief Judge, Presiding

Argued and Submitted
June 11, 1991 – San Francisco, California

Filed July 11, 1991
Amended September 18, 1991

Before: Robert R. Beezer, John T. Noonan, Jr. and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Fernandez

COUNSEL

James Weinstein and Randall Udelman, Arizona State University of Law, Tempe, Arizona, for the plaintiff-appellant Kamuela Price; and Walter R. Schoettle, Honolulu, Hawaii, for the plaintiffs-appellants Nui Loa Price and the Hou Hawaiians.

Steven S. Michaels and Randall Y.K. Young, Deputy Attorneys General, Honolulu, Hawaii, for the defendants-appellees State of Hawaii and Hawaii officials; Keith J. Steiner, Honolulu, Hawaii, for the defendant-appellee Honolulu Sailors Home Society; Philip J. Leas, Cades, Schutte, Fleming & Wright, Honolulu, Hawaii, for the defendants-appellees HFSL Corp., Peter S. Smith and Glenn K. Okada; and John P. Moon and Lissa H.

Andrews, Honolulu, Hawaii, for the defendant-appellee HonFed Bank.

OPINION

FERNANDEZ, Circuit Judge:

Once again we visit the scene of the ongoing contest which pits Dr. Nui Loa Price, Kamuela Price and the Hou Hawaiians (appellants) against the State of Hawaii (the State) and a number of its officials[1]. This visit we find a pitched battle into which a number of private parties have also been drawn. Those parties are the Honolulu Sailors Home Society (HSHS), HFSL Corporation, dba Harbor Associates, Peter S. Smith, dba Smith Development Corp., Glenn K. Okada, dba G.K.O. Corporation, and HonFed Bank. We will sometimes refer to all of this group as the "private appellees." Appellants claim that a certain parcel of land in which the private appellees purportedly have an interest is, in fact, owned by the State and is subject to the public trust which was created at the time that the State was admitted to the Union. Based upon the facts pled and otherwise before us in this action, we disagree and we affirm the district court's dismissal of the action as to all defendants other than the state officials.

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[1] Those officials are: William W. Paty, Herbert K. Apaka, Jr., Moses K. Kealoha, J. Douglas Ing, John Arisumi, Herbert Arata and John Waihee. They are hereafter referred to as "the state officials."

PROCEDURAL POSTURE AND BACKGROUND FACTS

In 1893 the Provisional Government of the Hawaiian Islands granted a parcel of land to HSHS (the lot). The grant provided that the lot "shall be used only for the purposes and uses of a Sailors Home . . . equally available to the sailors of all nations . . . . " It went on to provide that if the "described lot or any part thereof shall at any time cease to be used for the purposes of a Sailors Home, the whole of said lot shall forthwith revert to the Government of the Hawaiian Islands."

HSHS took possession of the lot and commenced using it for a sailors home. Unfortunately, as is so often true when perpetual restrictions are imposed upon the uses of land, changes in the uses of surrounding properties made the restriction outdated, onerous and lacking in economic sense. The lot is in the heart of Honolulu's downtown business district.

HSHS, however, did not simply violate the restrictions and abide the consequences. Rather, it commenced legal proceedings in which it asked the courts of Hawaii to approve certain plans in advance. Those plans would, in the opinion of HSHS, make use of the lot in a way that carried out the intent of the grantor, even though the uses may not, at first blush, have appeared to have been within the specific terms of the grant itself. HSHS resorted to the courts on three separate occasions, only the last resort is the subject of this case.

In 1969, HSHS filed an action in which the State was made a party. The Attorney General of the State appeared and represented its interests. At that time, the Circuit Court of the First Judicial Circuit of the State of Hawaii

determined that the lot itself was not going to be the physical location of a sailors home, but that its use in combination with other adjacent property would "constitute an actual physical use of a substantial portion of the premises for sailors." Moreover, said the court, this would be a "fair, just and reasonable" arrangement. *See* Findings of Fact and Conclusions of Law in *In re the Honolulu Sailors' Home Society*, CV No. 28078 (July 14, 1969). *See also* the judgment of even date. In other words, the court placed its imprimatur upon the contemplated transaction.

Appellants were not pleased with the fact that, in effect, no sailors' home was actually to be located on the lot itself. Thus, in 1989, appellants commenced this action for the purpose of having the private appellees ejected from the lot and of having the State commence receiving any income which the lot then produced. The reason that what appears to be a local dispute over property rights is before the federal courts is to be found in section 5(f) of the Hawaii Admissions Act. Pub. L. 86-3, § 5(f), 73 Stat. 4 (1959) (the Act). As pertinent here, section 5(f) reads as follows, and we have emphasized the part most pertinent to our discussion:

> The *lands* . . . together with the proceeds from the sale or other disposition of any such *lands* and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians . . . , for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands

> for public use. *Such lands, proceeds and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.*

Appellants assert that since the rights of the Provisional Government in the lot passed to the United States and thence to the State upon its admission to the Union, those rights are subject to the provisions of section 5(f) of the Act. That being so, say the appellants, the State through the inaction of its officials has allowed an improper diversion of revenues that should have come into the State's hands and been used for section 5(f) purposes.

This is not the first time that appellants have accused the State and its officials of violating the trust imposed upon the land which was ceded to the State under the terms of the Act. *See Price v. Akaka*, 928 F.2d 824 (9th Cir. 1991) (superseding 915 F.2d 469 (9th Cir. 1990)) (*Akaka*); *Price v. State of Hawaii*, 921 F.2d 950 (9th Cir. 1990) (*Price II*); *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985); *cert. denied*, 474 U.S. 1055, 106 S. Ct. 793, 88 L. Ed. 2d 771 (1986) (*Price I*). In each of those cases, as well as others hereinafter noted, we were required to explore the interface between state and federal law which was created upon the passage of the Act. We must now do so again, although, as will appear, many of the issues before us have already been decided in our prior visitations to this area.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 1983. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the grant of summary judgment and the grant of a motion to dismiss de novo. *Price II*, 921 F.2d at 954. Issues of eleventh amendment and qualified immunity are also reviewed de novo. *Id.* Questions of immunity which arise from facts not in dispute also present issues of law. *Id.*

We review the district court's award of fees under Rule 11 for an abuse of discretion. *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1365-66 (9th Cir. 1991) (en banc) (superseding 914 F.2d 1136, 1143 (9th Cir. 1990) (en banc)). Attorneys fees awards under 42 U.S.C. § 1988 are also reviewed for abuse of discretion. *Barry v. Fowler*, 902 F.2d 770, 773 (9th Cir. 1990).

DISCUSSION

A. *Standing.*

At the outset, we are met by the State's assertion that appellants lack standing. This issue can be quickly disposed of. We have previously made it clear that persons in the position of these appellants do have standing to challenge the use of section 5(f) lands. *See Akaka*, 928 F.2d at 826-27; *Ulaleo v. Paty*, 902 F.2d 1395, 1397 (9th Cir. 1990); *Price I*, 764 F.2d at 630. As we have said, although section 5(f) itself does not provide a private right of action, an action under 42 U.S.C. § 1983 is proper. *Ulaleo*, 902 F.2d at 1397; *Keaukaha-Panaewa Community Ass'n v.*

Hawaiian Homes Comm'n., 739 F.2d 1467, 1470-71, (9th Cir. 1984) (Keaukaha II).

B. *Immunity; Dismissal of the State and the State Officials.*

(1) *The State.*

Appellants have, once again, attempted to sue the State. As we said in *Price II*, 921 F.2d at 958: "It is pellucid that they cannot, for the eleventh amendment prohibits it." Thus, the district court properly dismissed the action against the State itself.

(2) *State Officers in their Official Capacity.*

The complaint seeks retrospective relief against the state officials. It seeks no prospective relief against them. To the extent that it is intended to be an action against them in their official capacities, it is likewise barred by the eleventh amendment, and the district court's dismissal was proper. *See Ulaleo*, 902 F.2d at 1398-1400.

(3) *State Officers in their Individual Capacities.*

There can be little doubt that appellants could bring their action under section 1983 against the state officials in their individual capacities, even if those officials were performing their governmental duties when they committed the alleged wrongs. *Akaka*, 928 F.2d at 828. The district court's determination to the contrary was in error.

However, the state officials argue that the facts which appear on this record make it clear that they are entitled

to qualified immunity. There can be no doubt that their activities or lack of activities regarding the lot in question were discretionary functions. As we said in *Price II*, 921 F.2d at 958: "[O]fficials performing discretionary functions, as were these officials, are entitled to qualified immunity if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known,' *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982)." However, the issue was not raised in the motion before the district court, although it was raised in the state officials' answer.

We recognize that in order to avoid a qualified immunity claim the appellants must show that the law supporting the following chain of reasoning was clearly established, *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738: that the State's interest was an interest in land,[2] that the land reverted to the State when the 1969 transaction was consummated,[3] and that the failure to collect revenues from

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[2] Whether the right held by the State is an interest in land within the meaning of section 5(f) of the Act, rather than mere "public property" referred to in section 5(b) is a matter subject to debate, although our recent decision in *Napeahi v. Pary*, 921 F.2d 897 (9th Cir. 1990) strongly suggests that it is the former.

[3] Whether the grant in question is, under the law of Hawaii, a fee simple determinable or a fee simple subject to a condition subsequent is not, as far as we have been able to ascertain, entirely clear. *Compare* Restatement of Property § 23 (1936) *with* Restatement of Property § 24 (1936). If the former, the property would revert automatically; if the latter, the State would have to take action to enforce the condition and recover the property. *See* Restatement of Property, Introductory Note to Chapter 4 (1936).

the land since that time resulted in a violation of section 5(f) of the Act,[4] all of which leads to liability of the state officials under section 1983.

While we have serious doubts that the plaintiffs can overcome the difficulties involved in showing that, objectively speaking, the officials violated clearly established legal principles, immunity is an issue that should first be addressed by the trial court. *See, id.* at 819-20, 102 S. Ct. at 2739.[5]

C. *Color of State Law; Dismissal of the Private Appellees.*

Appellants joined HSHS and the other private appellees in this section 1983 action[6], but the complaint alleged no facts to support the claim that the private appellees were acting under color of state law. On the contrary, the allegations of the complaint make it clear that HSHS is the owner in fee simple of the lot, subject to the use

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[4] Anyone who reviewed the situation would immediately discover that the 1969 transaction was expressly approved by the circuit court when it issued its decree on July 14, 1969. As we have already pointed out, that was a proceeding to which the State was a party. The proposition that the law clearly required state officials to attempt to oust HSHS and the other private appellees from the lot in the face of that state court decree is problematic to say the least.

[5] For the same reason, we decline to consider the state officials' claim that the action is barred by the statute of limitations.

[6] Of course, appellants have no direct cause of action under section 5(f). *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n.*, 588 F.2d 1216, 1220-24 (9th Cir. 1978), *cert. denied*, 444 U.S. 826, 100 S. Ct. 49, 62 L. Ed. 2d 33 (1979).

limitations and reversionary interest of the State which we have already described. Nothing in the complaint suggests that the private appellees have done anything that any other holder of fee title to land would not have done, except, of course, the seeking of court approval before taking actions that might have possibly caused divestment of the property. None of this contains a whisper of a suggestion that these appellees have acted with the State in any sense whatever.

We recognize that this case was dismissed at the pleading stage pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. We also recognize that there is great liberality in federal pleading. *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957); *Trixler Brokerage Co. v. Ralston Purina Co.*, 505 F.2d 1045, 1050 (9th Cir. 1974). However, private parties are not generally acting under color of state law, and we have stated that " '[c]onclusionary allegations, unsupported by facts, [will be] rejected as insufficient to state a claim under the Civil Rights Act.' " *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984) (citation omitted). This is appropriate for, as the Supreme Court has said:

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests.

Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 936-37, 102 S. Ct. 2744, 2753, 73 L. Ed. 2d 482 (1982).

Of course, the determination is usually "fact bound", and that militates against too hasty a termination of an action. *Id.* at 939, 102 S. Ct. at 2755. Nevertheless, a defendant is entitled to more than the bald legal conclusion that there was action under color of state law. The Supreme Court has "insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." *Id.* at 937, 102 S. Ct. at 2753. In deciding whether action is attributable to the State, a two-part test is applied:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id. at 937, 102 S. Ct. at 2753-54.

Appellants suggest nothing which indicates that the actions of the private appellees were in any way imposed by the State or that they exercised some right granted by the State, except to the extent that they sought state court approval of their 1969 plan before going ahead with it. But appellants do not allege that seeking court approval constituted state action, and, of course, "merely resorting to the courts . . . does not make a party a co-conspirator

or a joint actor with the judge." *Dennis v. Sparks*, 449 U.S. 24, 28, 101 S. Ct. 183, 186, 66 L. Ed. 2d 185 (1980).[7]

A person may become a state actor by conspiring with a state official, *id.*, or by engaging in joint activity with state officials, *Sable Communications v. Pacific Tel. & Tel. Co.*, 890 F.2d 184, 189 (9th Cir. 1989) (defendant sought the aid of law enforcement officials in order to use further procedures that would violate the plaintiff's first amendment rights). A person may also become a state actor by becoming so closely related to the State that the person's actions can be said to be those of the State itself. That might be found because the nexus is so close as to cause the relationship to be symbiotic, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725, 81 S. Ct. 856, 862, 6 L. Ed. 2d 45 (1961); *Vincent v. Trend Western Technical Corp.*, 828 F.2d 563, 569 (9th Cir. 1987). It might also be for such other reasons as performing public functions or being regulated to the point that the conduct in question

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[7] *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), is not to the contrary. There the state courts were used to enforce an egregious form of racial segregation, and the wrong was uniquely aggravated by court action. *Cf., Edmonson v. Leesville Concrete Co., Inc.*, 59 U.S.L.W. 4574 (U.S. June 3, 1991) (No. 89-7743), where the Court held that racially based peremptory challenges in civil cases involved the court system in malignant discrimination in the courtroom itself. Here, however, the state court was dealing with a relatively simple real property and trust issue which had no facinorous overtones whatever. At any rate, if the seeking of state court approval were the wrong in question, that occurred in 1969 and the statute of limitations has long since run. Haw. Rev. L. § 657-7. *Owens v. Okure*, 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989).

is practically compelled by the State. *Vincent*, 828 F.2d at 568-69.

None of these forms of connection between the State and the private appellees is pled here, nor are any of them hinted at. On the contrary, HSHS received a grant of property and has treated that property as its own for almost one hundred years. In other words, since there was no sufficient pleading that the private appellees were acting under color of state law, the district court properly dismissed the action as to them.[8]

D. *Award of Attorneys Fees to HSHS.*

(1) *District Court Award.*

The district court awarded HSHS fees against appellants and their counsel, Walter R. Schoettle. It did so based upon Fed. R. Civ. P. 11, and 42 U.S.C. § 1988.

In making that award, the district court found that there was simply no factual basis for the claim that HSHS was acting under color of state law. The court was also impressed with the fact that HSHS had repeatedly asked for a dismissal without prejudice, and had made appellant aware of the legal and factual positions of HSHS. In addition, it appeared that the parties had orally agreed upon a dismissal without prejudice, but that appellants'

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[8] Appellants, in passing, seem to suggest that pendent party jurisdiction would allow them to hold HSHS and the other private defendants in this action. Pendent party jurisdiction is not available. *See Finley v. United States*, 490 U.S. 545, 109 S. Ct. 2003, 104 L. Ed. 2d 593 (1989). *See also Aldinger v. Howard*, 427 U.S. 1, 96 S. Ct. 2413, 49 L. Ed. 2d 276 (1976).

counsel refused to sign a written agreement. Moreover, appellants and their counsel failed to appear to contest the requested fee award.

The district court thus determined that the action was "frivolous, groundless and unreasonable." Before an award of fees against the plaintiff may be made under section 1988, the action must be meritless and without foundation. *Hughes v. Rowe*, 449 U.S. 5, 14, 101 S. Ct. 173, 178, 66 L. Ed. 2d 163 (1980). That is precisely what the district court found here.

Rule 11 provides a different standard. Under Rule 11 an award is required if a paper which is frivolous is filed. *See Townsend v. Holman Consulting Corp.*, 929 F.2d at 1362. Here the district court found that the filing of the complaint against HSHS was, indeed, frivolous.

We recognize that the state action concept can be murky at its depths,[9] but when one is as close to its surface as we are in this case the concept has much greater clarity. Here, because the complaint so patently failed to state a claim against HSHS under section 1983 and because appellants and their counsel eschewed the opportunity to appear before the district court and disabuse it of its idea that the claim was entirely baseless, we are unable to say that the court abused its discretion when it awarded fees grounded upon both section 1988 and Rule 11. We, therefore, affirm its decision regarding fees.

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[9] *See Edmonson v. Leesville Concrete Co., Inc.*, 59 U.S.L.W. 4574 (U.S. June 3, 1991) (No. 89-7743).

(2) *Fees on Appeal.*

We, too, have the discretion to award fees on appeal when the appeal itself is frivolous. *See* 42 U.S.C. § 1988. Particularly in light of the district court's decision, we have given close attention to the request here, and to the arguments, some of them new, which appellants have suggested to us.

While we have not adopted appellants' arguments regarding the private appellees, we are not convinced that the appeal itself is frivolous. Beyond that, we have been subjected to arguments by the appellees in this case – arguments adopted by HSHS and the other private appellees -- on issues which, themselves, have previously been settled by us. *See*, for example, Part A of this Opinion regarding standing. Appellees have even suggested that there is no section 1983 action available regarding failure to follow section 5(f) of the Act. Again, the contrary has long since been settled by us. *See Price II*, 921 F.2d at 956; *Akaka*, 928 F.2d at 827-28; *Ulaleo*, 902 F.2d at 1397; *Keaukaka II*, 739 F.2d at 1470-71.

Accordingly, we will not exercise our discretion to award attorneys fees to any of the parties in this case.[10]

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[10] This is not antithetical to our determination regarding the district court's award of fees. We must exercise our own discretion when fees are requested on appeal. We deferentially review the district court's exercise of discretion when it awards fees. The standards are different. So may be the results.

CONCLUSION

Appellants have once again presented claims that the State of Hawaii and its officials have failed to carry out their solemn duties under the Hawaii Admissions Act. Their claims against the State have spent themselves upon a revetment built of immunity principles. Their claims against the private appellees have fallen far short of meeting the requirement that those parties must have acted under color of state law. However, they may continue to pursue their damage claims against the state officials at this time.

We have previously said that these appellants can call the responsible parties to account when section 5(f) of the Act is violated. *Price II*, 921 F.2d at 959. However, in order to do so appellants must, like everyone else, bring the right claims against the right individuals. Here the combination of a failure to seek prospective relief against the state officials and a temerarious attack on private individuals, who were merely using land which had been deeded to them, has brought the greater part of appellants' action to nought. The success or failure of the remainder awaits the skirmishes of another day.

AFFIRMED IN PART and REVERSED IN PART.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, individually and in his capacity as chief of the Hou Hawaiians, THE HOU HAWAIIANS, a Native Hawaiian Ohana, and KAMUELA PRICE,	)	CIVIL NO. 89-00561 HMF
Plaintiffs,	)	
vs.	)	
STATE OF HAWAII, WILLIAM W. PATY, individually and as Chairman of the Board of Land and Natural Resources of the State of Hawaii, HERBERT K. APAKA, JR., MOSES W. KEALOHA, J. DOUGLAS ING, JOHN ARISUMI, and HERBERT ARATA, individually and as Members of the Board of Land and Natural Resources of the State of Hawaii, JOHN WAIHEE, individually and as Governor of the State of Hawaii, THE HONOLULU SAILORS' HOME SOCIETY, HFSL CORP, d.b.a. HARBOR ASSOCIATES, PETER S. SMITH, d.b.a. SMITH DEVELOPMENT CORP., GLENN K. OKADA, d.b.a. G.K.O. CORP., and HONFED BANK, a federal savings bank,	)	
Defendants.	)	

(Filed Dec. 7, 1989)

ORDER GRANTING STATE DEFENDANTS' MOTION TO DISMISS AND PRIVATE DEFENDANTS' MOTION TO DISMISS COMPLAINT AND ACTION

INTRODUCTION

Two motions to dismiss Plaintiffs' complaint or, in the alternative, for summary judgment appear before the court. One is brought by the state defendants, the State of Hawaii, William Paty, Herbert K. Apaka, Jr., Moses W. Kealoha, J. Douglas Ing, John Arisumi, Herbert Arata and Governor John Waihee. The state defendants primarily assert sovereign immunity from this suit under the Eleventh Amendment. The other motion is brought by the private defendants, Honolulu Sailors' Home Society, HFSL Corp., Peter S. Smith, Glenn K. Okada, and HonFed Bank. Their motion primarily argues that the complaint fails to state a § 1983 claim against them as private individuals. Plaintiffs oppose both motions.

These motions for dismissal or summary judgment came on for hearing before this court on December 4, 1989. Walter R. Schoettle appeared on behalf of plaintiffs. Randall Y.K. Young and Charlotte E. Libman appeared on behalf of the State of Hawaii and the other state defendants, Keith J. Steiner appeared on behalf of defendant Honolulu Sailors' Home Society, Lissa H. Andrews appeared on behalf of defendant HonFed Bank, and Glenn H. Kobayashi appeared on behalf of defendants HFSL Corp., Peter S. Smith, and Glenn K. Okada. The court, having reviewed the motion and the memoranda in support thereof and in opposition thereto, having heard

the oral arguments of counsel, and being fully advised as to the premises herein, finds as follows:

Plaintiffs bring this claim for monetary, injunctive and declaratory relief under 42 U.S.C. § 1983 (1982) as Native Hawaiian special beneficiaries of a trust imposed by § 5(f) of the Hawaii Admissions Act upon certain lands granted by the United States to the State of Hawaii by § 5(b) of that Act. The complaint alleges that on March 21, 1893, the provisional Government of the Hawaiian Islands executed and delivered a deed for a certain parcel of land to defendant Honolulu Sailors' Home Society (hereinafter "HSHS") for use as a sailors' home upon the condition that "if the herein described lot or any part thereof shall at any time cease to be used for the purposes of a Sailors' Home, the whole of said lot shall forthwith revert to the Government of the Hawaiian Islands." In 1898 the United States annexed the Hawaiian Islands. As part of the Joint Resolution of Annexation, the United States allegedly acquired the Hawaiian government's reversionary interest in the subject property. On August 21, 1959, the United States admitted Hawaii as its fiftieth state through the Hawaii Admissions Act. P.L. No. 86-3, 73 Stat. 4 (1959). Section 5(b) of that Act granted the reversionary interest to the new State of Hawaii. Under § 5(f), the lands conveyed to the State of Hawaii under § 5(b) shall be held by the State as a public trust to be used in any of five enumerated purposes, including "for the betterment of of [sic] the conditions of native Hawaiians." The State delegated the responsibility as trustee to its Bureau of Land and Natural Resources.

On October 3, 1969, HSHS entered into a lease demising a portion of the subject property together with other

properties to Harbor Properties for the purpose of developing the properties as a residential and commercial leasehold condominium, the Harbor Square Condominium. The Harbor Square Condominium consists of two towers, the Harbor Tower (which is on the subject property) and the Town Tower (which is not). The Harbor Square Condominium continues to house a Sailors' Home Apartment consisting of 3650 square feet on the first floor and 4515 square feet on the second through fourth floors which shall be occupied and used for all purposes permitted by the HSHS charter. Since, the Sailors' Home Apartment falls exclusively within the Town Tower, which is not on the subject property, Plaintiffs assert that no part of the subject land is now used as a sailors' home, thus violating the conditions of the 1893 grant. As such, Plaintiffs contend that the land reverted back to the grantor government of the Hawaiian Islands and that the State of Hawaii as trustee of the § 5(f) trust has succeeded to the interests of the provisional government through the Joint Resolution of Annexation and the Admissions Act.

Plaintiffs allege that since October 3, 1969, HSHS and the developers (private defendants) have wrongfully received rents, issues, and profits from the subject property and that such monies rightfully belong to the beneficiaries of the § 5(f) trust. They also allege that by virtue of the § 5(f) trust, the state defendants as trustees owed a duty to plaintiffs to recover possession of the subject property and the moneys wrongfully lost. Finally, Plaintiffs assert that the defendants, acting under the color of state law, have deprived plaintiffs of the rights guaranteed them by § 5(f) and that if the state defendants are

permitted to continue as unsupervised trustees of the subject properties, the beneficiaries will suffer irreparable loss and injury.

Plaintiffs pray for numerous forms of relief. First, they ask that private defendants HSHS, HFSL Corp., Smith, Okada, and HonFed Bank be required to set forth the nature of their claims to the subject property. Second, plaintiffs seek a declaration regarding the nature of those private defendants' claims to the subject property. Third, plaintiffs seek declaratory judgment that the trustee State of Hawaii owns the subject property in fee simple in trust for the benefit of plaintiffs and other beneficiaries under § 5(f) of the Admissions Act. They ask the court to find a reversion of the estate created by the 1893 grant upon the interruption of use as a sailors' home and to find that the private defendants have no legal interest in the property. Fourth, they ask the court to permanently enjoin the private defendants from asserting any claim in or to said property adverse to the trust. Fifth, plaintiff [sic] seek a monetary judgment against all defendants, jointly and severally, in the amount of all rents, issues, and profits wrongfully received from the subject property by defendant HSHS and the other private defendants since the date of the lease, together with interest thereon. Sixth, plaintiffs ask the court to appoint plaintiff Doctor Nui Loa Price, or some other suitable person having sympathy for native Hawaiians' concerns, as co-trustee with respect to the property recovered herein on behalf of the trust estate. Seventh, in the event their § 1983 claim succeeds, they seek payment of their attorney's fees as a prevailing party pursuant to 42 U.S.C. § 1988. Finally, they ask for such other relief as may be just and proper.

DISCUSSION

I. STATE DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

The state defendants, who include the State of Hawaii, state officials in their official capacity and state officials in their individual capacity, move the court to dismiss plaintiffs' complaint or, in the alternative, to grant summary judgment in their favor. They assert sovereign immunity from this suit, challenge plaintiffs' standing to pursue this action, question the existence of § 1983 claim to enforce § 5(f) of the Admissions Act, and contend that plaintiffs have otherwise failed to state a claim upon which relief can be granted under § 1983.

A. Sovereign Immunity and Jurisdiction

The state defendants assert that this court has no jurisdiction to resolve the claims against them because of their sovereign immunity as guaranteed by the Eleventh Amendment to the Constitution. Thus, they move for dismissal of the complaint under Federal Rules of Civil Procedure Rule 12(b)(1). For the purposes of clearer analysis, the state defendants divide into three categories: the State of Hawaii, state officials in their official capacity, and state officials in their individual capacity.

1. Claims Against the State of Hawaii

The State of Hawaii correctly argues that it has not waived its sovereign immunity, and thus this suit is barred by the Eleventh Amendment regardless of the

relief sought. *Papasan v. Allain*, 478 U.S. 265, 276, 106 S. Ct. 2932, 2939 (1986). Although they disagree with the rulings, Plaintiffs concede that the prior rulings of this court and other courts in litigation involving native Hawaiians compels dismissal of the complaint against the State of Hawaii. A court will only find that a state has waived its sovereign immunity where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Price v. State of Hawaii*, 764 F.2d 623, 629 (9th Cir. 1985) (hereinafter *"Price I"*), *quoting Edelman v. Jordan*, 415 U.S. 651, 673 (1974).

Although the Hawaii Admission Act authorizes the United States to sue the State that act does not remove the State's sovereign immunity from suit by the Hou Hawaiians and their representatives. *Id.* at 629. The State has also waived part of its sovereign immunity and has consented to suit for certain contract and tort claims. Haw. Rev. Stat. §§ 661-1, 662-2. The State, however, consented to suit only in state courts and not to suit in federal court. In a 1981 case, *In re Holoholo*, 512 F. Supp. 889 (D. Haw. 1981), this court held that these statutes waived the State's sovereign immunity from suit in federal court and asserted jurisdiction over the State. In 1984, however, the Hawaii legislature amended the statute with the express purpose to "declare the intent of the legislature in amending section 661-1 and 662-3 . . . to extend jurisdiction to district courts in tort actions on claims against the State and certain other claims against the State, was originally and is now to extend jurisdiction for such actions and claims against the State to state district courts, and *not to extend jurisdiction for such actions and claims to federal*

district courts." 1984 Sess. Laws of Hawaii, Act 135 at 258 (emphasis added). The legislature went on to state that "[t]his Act is a response to the court's erroneous interpretation of section 662-3, Hawaii Revised Statutes, in *In re Holoholo.*" *Id.* Therefore, these §§ 661-1 and 662-2 cannot be read as a consent to suit in federal court, and all claims against the State of Hawaii must be dismissed for lack of jurisdiction, including those for monetary, injunctive, and declaratory relief.

2. Claims Against State Officials in their Official Capacity

Against state officials acting in their official capacity, plaintiffs seek monetary damages for rents, issues, and profits, and for attorney's fees. Oddly, plaintiffs' complaint does not seek injunctive relief or declaratory relief against the state officials in their official capacities.

The Eleventh Amendment immunizes state officials acting in their official capacity from suits for retroactive monetary relief in federal court. *Price I*, 764 F.2d at 629, *citing Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 909 (1984). Even more, the United States Supreme Court has held that neither States nor state officials in their official capacities are "persons" who may be sued under § 1983. *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304 (1989). The Eleventh Amendment immunity extends to state officials because any judgment against a state official in that capacity will ultimately be paid by the State. Allowing suits for monetary relief against state officials in the face of this reality

would undermine the Eleventh Amendment immunity and render it meaningless.

A plaintiff, however, may sue a state official in his official capacity for prospective relief, such as an injunction, that governs the state official's future conduct. *Price I*, 764 F.2d at 629; *Pennhurst*, 465 U.S. 89, 102-03, 900, 909 (1984). This legal principal cannot preserve plaintiffs' complaint as it pertains to the claims against the state officials because plaintiffs have failed to seek injunctive or other prospective relief against the state officials in their official capacities. Plaintiffs seek injunctive relief only against the private defendants to prevent them from asserting any claim to the subject property. The request for the court to appoint a native Hawaiian to serve as co-trustee, although prospective, is not sought against state officials. Since the State itself is the sole trustee of the § 5(f) trust, that request must be perceived as an action against the State only.

Similarly, plaintiffs' complaint does not seek a declaratory judgment against the state officials in their official capacity. Plaintiffs seek a declaration regarding the nature of the private defendants' interests in the subject property, a declaration that the State of Hawaii owns the legal title to the subject property in fee simple and that the private defendants have no legal interest. Therefore, the plaintiffs have not overcome the sovereign immunity of officials in their official capacity by seeking declaratory relief.

Even if plaintiffs had sought declaratory relief against state officials in their official capacity, it appears that the suit would still be barred by the Eleventh

Amendment since the declaratory relief would be primarily retroactive in nature. Declaratory relief that is directed at a past violation of federal law implicates the Eleventh Amendment if it would act like a money judgment. *Green v. Mansour*, 106 S. Ct. 423, 428 (1985). The court must look beyond the labels attached by the plaintiff and must determine whether the declaration sought is primarily retrospective in nature.

In *Papasan v. Allain*, 106 S. Ct. 2932 (1986), the State's sovereign immunity barred suit seeking replacement of lost trust corpus because such relief would, in effect, award accrued monetary liability. School students and officials sued the State of Mississippi for breach of trust obligations by selling lands granted to the State for the use of schools. The Court rejected the argument that the sale of the land represented a continuing violation of federal law and held that ordering the State to replace the trust corpus, even though nominally injunctive and prospective, would have the same effect as monetary retrospective relief.

The instant case differs markedly from *Papasan*, but many aspects of the declaratory relief sought by plaintiffs are retrospective in nature. Plaintiffs here more successfully assert a continuing violation of federal law. Assuming plaintiffs allegations to be true, the State has failed to exercise its power of entry to terminate the determinable estate or has failed to take possession after reversion. Since a grantor may do so at any time within the limitations period, the State continually fails to assert the rights of the trust. The request for declaratory relief is largely retrospective in nature, however, because it seeks

to establish a basis upon which to recover monetary relief.

3. Claims Against State Officials in their Individual Capacity

Plaintiffs assert claims for monetary relief against state officials in their individual capacities. State officials sued in their individual capacities enjoy no Eleventh Amendment immunity because they are not cloaked with the sovereignty of the state. As such the complaint against them in that capacity cannot be dismissed for a lack of jurisdiction.

The complaint nevertheless fails to state a § 1983 claim against the state officials in their individual capacities. The court must look beyond the labels attached to the defendants and must consider whether they actually face suit for actions taken outside their official capacity. In two earlier cases involving the same plaintiffs, this court has dismissed claims against state officials in their individual capacities because the complaint totally failed to allege acts taken in an individual capacity. In *Price v. Ariyoshi*, Civil No. 85-1189 (D. Haw. February 23, 1987) (Fong, J.), the court dismissed a complaint against state officials in their individual capacities for failure to state a claim because a review of the complaint indicated that its allegations were directed exclusively toward the defendants in their official capacities. No allegation focused on any acts or omissions in their individual capacities. *Id.* at 8-9. Likewise in *Price, et al. v. Akaka, et al.*, Civil No. 88-773 (D. Haw. January 11, 1989) (Ezra, J.), the court dismissed a complaint against state officials that sought

to avoid sovereign immunity by suing them in their individual capacities. The court's review of the complaint revealed that the only reference to a suit against defendants in their official capacities was plaintiffs' prayer for "judgment against Defendants jointly and severally." *Id.* at 11. Since all other allegations refer only to acts performed in the defendants' official capacity, the complaint failed to state a claim against the state defendants in their individual capacities.

The complaint in the case now before the court similarly fails to allege any acts or omissions taken in the state defendants' individual capacities beyond simply naming them as defendants and seeking joint and several liability. Plaintiffs only challenge acts and omissions taken by the defendants in their administration of the § 5(f) trust fund. They performed those acts and made those omissions within their capacity as state officers. Therefore, the complaint fails to state a claim upon which relief can be granted to plaintiffs against state defendants in their individual capacities. The court must dismiss the complaint. Fed. R. Civ. P. Rule 12(b)(6).

B. Existence of § 1983 Claim to Enforce § 5(f)

Defendants argue that § 5(f) creates no right in trust beneficiaries that is enforceable under § 1983. Section 5(f) of the Admissions Act creates no independent right of action; the United States may sue to enforce the trust, but individual Hawaiians, including native Hawaiians made beneficiaries under the trust, have no private cause of action. *Price I*, 764 F.2d at 631; *see Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm.*, 588 F.2d 1216 (9th

Cir. 1978), *cert. denied*, 444 U.S. 826 (1979) (hereinafter *"Keaukaha I"*).

Despite this limitation on § 5(f), that section of the Admissions Act does create a federal "right" enforceable under 42 U.S.C. § 1983. *Price I*, 764 F.2d at 628, citing *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm.*, 739 F.2d 1467 (9th Cir. 1984) (hereinafter *"Keaukaha II"*). Section 5(f)'s trust obligation is rooted in federal law, and the power to enforce that obligation is contained in federal law. Thus, precedent of the Court of Appeals for the Ninth Circuit clearly recognizes this cause of action.

II. PRIVATE DEFENDANTS' MOTION

The private defendants, Honolulu Sailors' Home Society, HFSL Corp., Peter S. Smith, Glenn K. Okada, and HonFed Bank, also bring a motion to dismiss the § 1983 complaint against them or, in the alternative, for summary judgment. They argue that the complaint fails to state a § 1983 claim against them as non-state actors. Lacking that federal claim, they argue that this court has no subject matter jurisdiction over them. Because the private defendants' arguments are correct, the claims against them must be dismissed.

A. Failure to State § 1983 Claim Against Non-State Actors

Private persons and organizations are not generally acting under "color of law" and hence, are not ordinarily subject to § 1983 actions. Although the legal landscape is

not well-settled, it appears that a private person or organization will be deemed to have acted under color of law when it conspires with a public official or acts in concert with such an official to deprive a plaintiff of his or her constitutional or statutory rights. As such, a private individual or entity has to assume some sort of agency relationship with the state to act under the color of state law required to impose liability under § 1983.

Plaintiffs have clearly failed to plead facts that would assert a § 1983 claim against the private defendants. The complaint merely alleges that the private defendants have attempted to acquire some kind of interest in the subject property. They have either acquired rights to develop the land or have secured a loan by perfecting a mortgage in the subject property as collateral. These acts do not rise to the level of conspiracy with public officials. They represent completely private acts not taken under color of state law.

B. Lack of Subject-Matter Jurisdiction over Other Claims

Once the § 1983 claim against the private defendants is dismissed, this court lacks subject-matter jurisdiction to adjudicate claims against those defendants, regardless of whether the federal claims against the state defendants survive the motion to dismiss. This court lacks diversity jurisdiction because parties on both sides are residents of the State of Hawaii or are doing business here, destroying complete diversity. As such, this court can only attempt to adjudicate this case under its federal question jurisdiction. 28 U.S.C. § 1331 (1982).

Plaintiffs' § 1983 claim provides the only basis for federal question jurisdiction. The complaint seeks declaratory judgment pursuant to 28 U.S.C. § 2201 (1982), but that federal statute merely provides a type of remedy; it provides no independent grounds for subject-matter jurisdiction where none already exists. Likewise Federal Rule of Civil Procedure Rule 19 (providing joinder of necessary and indispensible parties) does not provide an independent ground for jurisdiction. In fact, that rule only allows such joinder when it "will not deprive the court of jurisdiction over the subject matter of the action."

Plaintiffs' attempt to enforce the § 5(f) trust created by federal law does not "arise under" the laws of the United States and, thus, does not establish federal question jurisdiction. As already noted, § 5(f) provides no independent cause of action. Under Justice Holmes's formulation, this fact would defeat federal question jurisdiction since his formulation held that "[a] suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S. Ct. 585, 586 (1916). This simple and comprehensible formulation, however, has not found universal application.

The Court of Appeals for the Ninth Circuit has provided such guidance in *Keaukaha I*, 588 F.2d 1216, 1224-27. In that case, the court was faced with the issue of whether claims premised on the Hawaiian Homes Commission Act, 42 Stat. 108, (which also does not provide a private cause of action) arise under the laws of the United States. After a careful review of the unsettled and confusing body of law concerning "arising under" jurisdiction, the Court of Appeals held that such claims do not invoke

federal question jurisdiction because the benefits under the Commission Act had lost their federal nature. Upon admission of Hawaii into the Union, the entire Commission Act program was turned over to the State of Hawaii and the United States conveyed its interest in the home lands to the state, which are now administered by state officials. The appellate court concluded that the Commission Act and the rights and duties it created had become elements of Hawaiian state law. *Id.* at 1226.

The reasoning in *Keaukaha I* guides this court's evaluation of § 5(f) of the Admissions Act and leads to the conclusion that a suit to enforce the trust does not arise under the laws of the United States. Like those under the Commission Act, the rights and benefits under the Admissions Act have lost their federal nature. Upon admission as a state, the lands involved were conveyed to the State of Hawaii, and the State began to administer those public lands and the trust in which they were held. In fact, Congress authorized the Hawaiian legislature to decide the manner in which the § 5(f) lands, proceeds, and income must be managed and disposed of. The Admissions Act and the Commission Act are sufficiently similar that the holding in *Keaukaha I* applies to the instant case and compels the finding that a suit to enforce § 5(f) of the Admissions Act does not, in itself, arise under the laws of the United States.

Assuming that the claims against the state defendants survived the motion to dismiss, the court would still lack subject-matter jurisdiction to adjudicate the claims against the private defendants. Although the state defendants would face federal claims, the private defendants would face only state claims and would have no

independent ground for jurisdiction. This court's pendant jurisdiction could not pick up the claims against the private defendants. Pendant jurisdiction is usually invoked when a single defendant faces both federal and state claims; the federal court asserts jurisdiction over the state claims in order to fully adjudicate a case that has a federal question. The doctrine of pendant jurisdiction allows a federal court to hear a nonfederal claim if it is closely related to the federal claim. Generally the nonfederal and federal claims must "derive from a common nucleus of operative fact" and be of such a nature that a claimant "would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 1138 (1966).

Courts typically assert pendant jurisdiction when a single defendant faces both state and federal claims. This case, however, presents the atypical situation of "pendent parties" when there is a federal claim against one party but no independent ground for jurisdiction over a second party facing state claims which arise out of the same nucleus of operative facts as the federal claim.

The Supreme Court of the United States appears to disfavor the concept of asserting jurisdiction over "pendent parties" but has not yet firmly determined its validity. The court has, however, firmly determined its *invalidity* when invoked to retain a county as a defendant on the basis of a pending § 1983 claim against another defendant. *Aldinger v. Howard*, 427 U.S. 1, 96 S. Ct. 2413 (1976). The Court disallowed jurisdiction over a pendant party only after it noted that, "[f]or the purposes of addressing the jurisdictional question in this case . . . we think it quite unnecessary to formulate any general, all-

encompassing jurisdictional rule." *Id.*, at 13, 96 S. Ct. at 2419. To this end, the Court resolved the question of pendant-party jurisdiction by looking to the statutory language creating the federal cause of action in the particular case. The ability of the statute to permit pendant-party jurisdiction should be construed in light of the scope of the cause of action over which Congress has already extended federal-court jurisdiction. *Id.*, at 17, 96 S. Ct. at 2421. Limiting its holding to the Congressional purpose embodied in 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983, the Court held that a county facing state-law claims could not be joined as a pendant party to a § 1983 action since counties are excludable from the "person[s]" in § 1343(3) who can be held liable for constitutional deprivations. The Court rejected the notion that, despite the statute, Congress left federal courts free to create a jurisdictional doctrine enabling the courts to circumvent this exclusion of counties when the civil rights action and the state law claim arise from the same core of operative facts. *Id.*, at 16, 96 S. Ct. at 2421. Given the purpose of § 1983, the courts are similarly not free to circumvent the exclusion of private individuals or entities when the civil rights action and state-law claim arise out of a common nucleus of operative facts.

All claims against the private defendants fail. The complaint fails to state a § 1983 claim against the private defendants because it lacks any allegation that the private entity or individual was somehow working in concert with the State or with some public official. Once the § 1983 fails, any other claims against the private defendants fall outside this court's subject-matter jurisdiction and must be dismissed under Rule 12(b)(1).

CONCLUSION

The court GRANTS both state defendants' and private defendants' motions to dismiss the complaints against them. The State of Hawaii and the state defendants in their official capacity are immunized from this suit by the Eleventh Amendment. The complaint fails to state a claim against the state defendants in their individual capacities. The complaint also fails to state a § 1983 claim against the private defendants as non-state actors and thus should be dismissed. Once that claim falls out, the court lacks subject matter jurisdiction over the claims against the private defendants. The court need not reach the motions for summary judgment.

Because the court dismisses the complaint and action against all parties, the court does not reach and need not address the defendants' motions in the alternative for summary judgment.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, DEC 7 1989

/s/ Harold M. Fong
Harold M. Fong
UNITED STATES
DISTRICT JUDGE

APPENDIX "C"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DR. NUI LOA PRICE, et al., Plaintiffs-Appellants,	)	Nos. 90-15117 and 90-15863
v.	)	ORDER
STATE OF HAWAII, et al., Defendants-Appellees.	)	

(Filed Oct. 30, 1991)

Before: BEEZER, NOONAN, and FERNANDEZ, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing filed by appellees, John Waihee, William W. Paty, Herbert K. Apaka, Jr., Moses W. Kealoha, J. Douglas Ing, John Arisumi, and Herbert Arata, which petition was styled "Appellee Hawaii Officials' Petition for Rehearing."

Therefore, the appellee Hawaii Officials' petition for rehearing is DENIED.

APPENDIX "D"

In the United States District Court

for the District of Hawaii

DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, individually and in his capacity as chief of the HOU HAWAIIANS, THE HOU HAWAIIANS, a Native Hawaiian Ohana, and KAMUELA PRICE, individually, and in his capacity as member of the elder council of the HOU HAWAIIANS, Plaintiffs, vs. STATE OF HAWAII, WILLIAM W. PATY, individually and as Chairman of the Board of Land and Natural Resources of the State of Hawaii, HERBERT K. APAKA, JR., MOSES W. KEALOHA, J. DOUGLAS ING, JOHN ARISUMI, and HERBERT ARATA, individually and as Members of the Board of Land and Natural Resources of the State of Hawaii, JOHN WAIHEE, individually and as Governor of the State of Hawaii, THE HONOLULU SAILORS HOME SOCIETY*, a Hawaii non-profit corporation, HFSL CORP., a Hawaii corporation, d.b.a. HARBOR ASSOCIATES,	CIVIL NO. 89-00561 HMF COMPLAINT

PETER S. SMITH d.b.a. SMITH DEVELOPMENT CORP., GLENN K. OKADA, d.b. G.K.O. CORP., and HONFED BANK, a federal savings bank,

Defendants.

(Filed July 21, 1989)

COMPLAINT

Come now Plaintiffs, THE HOU HAWAIIANS, DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, individually and in his capacity as hereditary chief of the HOU HAWAIIANS, and KAMUELA PRICE, individually and as member of the elder council of the HOU HAWAIIANS, and for Complaint against Defendants allege and aver as follows:

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §§1331 and 1343. This is an action seeking relief under Title 42 U.S.C. §1983 and Title 28 U.S.C. §2201. The rights sought to be secured in this action are rights of Plaintiffs as Native Hawaiian special beneficiaries of a trust imposed by §5(f), Act of March 18, 1959, Pub. L. 86-3, Stat. 4, (Admission Act), upon certain lands granted by the United States to the State of Hawaii by § 5(b) of the Admission Act.

PARTIES

2. The HOU HAWAIIANS is a Native Hawaiian Ohana or tribe made up of related families of native Hawaiians of 50% or more Hawaiian ancestry. Plaintiff DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, is the hereditary chief of the HOU HAWAIIANS, and is a native Hawaiian of 50% ancestry. Plaintiff KAMUELA PRICE is a member of the elder council of the HOU HAWAIIANS and sues individually and in such capacity. Plaintiffs are residents of the State of Hawaii.

3. Plaintiff DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, is eligible for a 99 year lease of Hawaiian Home Lands and other Native Hawaiian entitlements as provided in § 5(f) of the Admission Act.

4. Defendant STATE OF HAWAII is a State of the United States of America, admitted to the Union on an equal footing with the other States in all respects whatever, by the Admission Act.

5. Defendant WILLIAM W. PATY is a resident of the State of Hawaii and is the Chairman of the board of Land and Natural Resources of the State of Hawaii. Defendants HERBERT K. APAKA, JR., MOSES W. KEALOHA, J. DOUGLAS ING, JOHN ARISUMI and HERBERT ARATA are residents of the State of Hawaii and are the members of the Board of Land and Natural Resources of the State of Hawaii.

6. Defendant JOHN WAIHEE is a resident of the State of Hawaii and is the Governor of the State of Hawaii. (Defendants STATE OF HAWAII, PATY, APAKA,

KEALOHA, ING, ARISUMI ARATA and WAIHEE are hereafter collectively referred to as "State Defendants."

7. Defendant HONOLULU SAILORS' HOME SOCIETY * ("HSHS"), also known as HONOLULU SAILOR'S HOME SOCIETY, is a non-profit corporation, duly organized and existing under the laws of the State of Hawaii for the purpose of operating a home for sailors in the State of Hawaii.

8. Defendant HFSL CORP., is a corporation duly organized and existing under the laws of the state of Hawaii, whose principal place of business is in the State of Hawaii, doing business under the name "HARBOR ASSOCIATES", a tradename duly registered with the Business Registration Division of the Department of Commerce and Consumer Affairs of the State of Hawaii.

9. Defendant PETER S. SMITH is a resident of the State of Hawaii, doing business under the unregistered fictitious name "SMITH DEVELOPMENT CORP."

10. Defendant GLENN K. OKADA is a resident of the State of Hawaii, doing business under the unregistered fictitious name "G.K.O. CORP." also known as "GKO CORP."

11. Defendant HONFED BANK, ("HONFED"), is a federal savings bank, whose principal place of business is in the State of Hawaii.

COUNT I

12. On March 21, 1893, the provisional Government of the Hawaiian Islands possessed and owned in fee simple absolute a certain parcel of land situated in the

City of Honolulu, Island of Oahu, (now City and County of Honolulu, State and District of Hawaii), hereinafter called the "Defeasible Lot", described as follows:

> Beginning at the North corner of Richards and Halekauwila Streets, and running as follows, viz: N. 30° 25' W. thence 127.5 feet along mauka side of Halekauwila Street; N. 51° 3' E. thence 137.7 feet along Grant 3,474 to Trustees of the Sailors' Home Society; S. 37° 50' E. thence 135 feet along L. C. A. 738 to Kaunuohua (Enterprise Mill Property); S. 54° 34' W. thence 156 feet along new line of Richards Street to the initial point.

13. On or about said date, J. A. King, Minister of Interior, on behalf of the Provisional Government of the Hawaiian Islands, executed and delivered a deed for said Defeasible Lot to Defendant HSHS, under the name "Honolulu Sailor's Home Society", for purposes and uses of a sailors' home with the condition that "if the herein described lot or any part thereof shall at any time cease to be used for the purposes of a Sailors' Home, the whole of said lot shall forthwith revert to the Government of the Hawaiian Islands." Said deed is recorded in the Bureau of Conveyances of the State of Hawaii in Liber 142, at pages 96 and 97.

14. Thereafter, on October 3, 1969, Defendant HSHS entered into a lease recorded on October 15, 1969 in Liber 6728 at page 281, demising a portion of the Defeasible Lot together with other properties, to Harbor Properties, Ltd., as general partner of PUGET-PACIFIC, a limited partnership, lessee.

15. The portion of the Defeasible Lot demised by said lease is hereinafter called the "Subject Property" and is described as follows:

Parcel 1: All of that certain parcel of land (being a portion of Deed of Minister of Interior to Honolulu Sailors' Home Society dated March 21, 1893, recorded in the Bureau of Conveyances of the State of Hawaii in Book 142 on pages 96 and 97) situated at the north corner of Halekauwila and Richards Streets, Honolulu aforesaid, more particularly described as follows:

Beginning at the east corner of this piece of land, the south corner of Lot 11 of Land Court Application 685 and on the northwesterly side of Richards Street, the coordinates of said point of beginning referred to a City and County Survey Street Monument on on [sic] the center line of Queen Street near the south corner of Alakea and Queen Streets being 337.03 feet south and 45.13 feet west, and running by true azimuths measured clockwise from south:

1. 54° 34' 106.23 feet along the northwesterly side of Richards Street; thence along the northerly side of Halekauwila and Richards Streets on a curve to the right with a radius of 45.00 feet, the azimuth and distance of the chord being:

2. 102° 02' 30" 66.33 feet;

3. 149° 31' 60.04 feet along the northeasterly side of Halekauwila Street;

4. 159° 28' 10.04 feet along the northeasterly side of Halekauwila Street;

5. 231° 03' 136.12 feet along Grant 3474 to Honolulu Sailors' Home Society;

6. 231° 45' 30" 135.88 feet along lots 1 and 11 of Land Court Application 685 to the point of beginning, and containing an area of 18,710 square feet.

16. The purpose of said lease was to develop the Subject Property together with other property as a residential and commercial leasehold condominium.

17. Thereafter, Defendant HSHS and Puget-Pacific developed the Subject Property together with other property as a condominium project known as "Harbor Square", Condominium Map Number 125, according to the declaration, dated April 15, 1970, and recorded on April 24, 1970, in Liber 6978 at page 1.

18. According to said declaration, the condominium project consists of a single building with two towers known as the Town tower and the Harbor tower. The project is divided into the following separate estates: (a) 360 residential apartments, consisting of 10 apartments on each floor of the Harbor Tower on floors 7 through 12 and 14 through 27 and 8 apartments on each floor of the Town Tower on floors 7 through 12 and 14 through 27; (b) two commercial apartments designated as apartments 1 and 2 on the first floor and mezzanine of the Harbor Tower; (c) one apartment designated as apartment 3, and known as the Sailors' Home Apartment, consisting of 3650 square feet on the first floor and 4515 square feet on floors 2 through 4; (d) one garage apartment, designated as apartment 4, consisting of 180,980 square feet on seven levels on the mauka side and eight levels on the makai side and one level immediately above the Sailors' Home

Apartment; (e) six office apartments, designated apartments 5 through 10, situated on floors 1 thorough 6 of the Town Tower.

19. The use of said apartments is governed by Section G. of said declaration as follows:

> G. USE: The Apartments shall be occupied and used only as follows:
>
> 1. The residential apartments shall be occupied and used only as private dwellings by the respective owners thereof, their tenants, families, domestic servants and social guests, and for no other purpose except that a full time residential occupant may use a portion of the apartment so occupied for his own secondary general office purposes to the extent that such use does not impair the residential use and enjoyment of that portion of the building by others. the apartments shall not be used primarily for office purposes, nor be rented for transient or hotel purposes, which are defined as (a) rental for any period less than 30 days, or (b) any rental in which the occupants of the apartment are provided customary hotel services such as room service for food and beverages, maid service, laundry and linen or bellboy service.
>
> 2. The commercial apartments shall be occupied and used only for general commercial purposes and may include any lawful commercial enterprise therein.
>
> 3. The Sailors Home Apartment shall be occupied and used for all purposes permitted by the Society's charter of incorporation.
>
> 4. * * *

5. the office apartments shall be occupied and used for general office or commercial purposes.

Except for the above expressed restrictions, the owners of the respective apartments shall have the absolute right to lease such apartments subject to all provisions of this Declaration.

20. The Harbor Tower as described in said declaration is situated on the Subject Property. The Town Tower, the Garage Apartment and the Sailors' Home Apartment as described in said declaration are not situated on the Subject Property.

21. Since on or about April 15, 1970, substantial portions of the Subject Property have been used for purposes other than a sailors' home.

22. At the present time, no portion of the Subject Property is being used as a sailors' home.

23. The United States of America succeeded to the reversionary interest of the Provisional Government of the Hawaiian Islands by virtue of the Joint Resolution of Annexation approved by Congress on July 7, 1898. 30 Stat. 750.

24. On August 21, 1959, the reversionary interest of the United States of America in and to the Subject Property was granted to the State of Hawaii by Section 5 of the Admission Act.

25. On August 21, 1959, legal title to the reversionary interest of the United States in the Subject Property was not vested in Territory of Hawaii; and, therefore, the

State of Hawaii did not succeed to the title of the United States pursuant to § 5(a) of the Admission Act.

26. On August 21, 1959, the reversionary interest of the United States in the Subject Property had not been set aside pursuant to law for the use of the United States under any act of Congress, Executive order, proclamation of the President or Governor of the Territory of Hawaii. Therefore, § 5(c) of the Admission Act does not apply to the Subject Property.

27. Immediately prior to admission of Hawaii into the Union, the reversionary interest of the United States in the Subject Property was not controlled by the United States pursuant to permit, license, or permission, written or verbal, from the Territory of Hawaii or any department thereof. Therefore, § 5(d) of the Admission Act does not apply to the Subject Property.

28. The reversionary interest of the United States in the Subject Property was granted and conveyed to the State of Hawaii by § 5(b) of the Admission Act, subject to the uses and trusts set forth in § 5(f) of the Admission act, as follows:

> "The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian

> Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university."

29. By virtue of the aforesaid deed recorded in Liber 142, at pages 96 and 97, ownership and the right to possession of the Subject Property reverted by operation of law to the State of Hawaii, in trust as set forth in § 5(f) of the Admission Act, on or about October 3, 1969, when Defendant HSHS leased the Subject Property for purposes other than a sailors' home.

30. PUGET-PACIFIC was a limited partnership formed by Harbor Properties, Ltd., general partner, Bishop Corporation, Steven J. Kolar, William J. Bain, Perry B. Johanson, W. Price Sullivan, and KBH Corporation, limited partners, by agreement dated April 1, 1969, and filed on May 14, 1969. By amendment dated December 8, 1969, REI of Arlington, Inc., a Texas corporation, a [sic] was added as a limited partner. By amendment

dated October 18, 1971, KBH Corporation changed its name to Park Shore Properties, Inc., a Delaware corporation. By amendment dated April 2, 1974, A E Properties, Inc., a California corporation, succeeded to the interest of REI of Arlington, Inc., by merger. The interests of Steven J. Kolar, W. Price Sullivan, William J. Bain, Park Shore Properties, Inc., and Perry B. Johanson were assigned to Harbor Associates, by amendments dated June 23, 1981, June 30, 1981, June 30, 1981, June 23, 1981, and June 16, 1981, respectively. Harbor Associates became the general partner and Harbor Properties, Ltd., became a limited partner by amendment dated July 28, 1981. Alfred J. Ostheimer succeeded to the interest of Bishop Corporation by amendment dated August 12, 1981. Harbor Associates acquired the interest of A E. Properties, Inc., by amendment dated September 30, 1981. Harbor Properties, Ltd., was dissolved and all of its interest in Puget-Pacific was assigned to Harbor Associates by amendment dated June 23, 1982. Hereinafter Puget-Pacific and its various partners mentioned in this paragraph together with Defendants HFSL, SMITH and OKADA, will collectively be called the "Developers."

31. On September 30, 1981, Puget-Pacific mortgaged the Subject Property together with other property to HONOLULU FEDERAL SAVINGS & LOAN ASSOCIATION, to secure the repayment of a promissory note in the amount of $3,000,000.00, which mortgage was recorded on October 1, 1981, in Liber 15851, at page 608.

32. On June 30, 1982, Puget-Pacific mortgaged the Subject Property together with other property to HONOLULU FEDERAL SAVINGS & LOAN ASSOCIATION, to secure the repayment of a second promissory note in the

amount of $4,300,000.00, which mortgage was recorded on June 30, 1981, in Liber 16436, at page 174.

33. On July 1, the interest of Alfred J. Ostheimer as limited partner in Puget-Pacific was assigned to Harbor Associates, whereupon Puget-Pacific ceased to exist by virtue of Harbor Associates having acquired all of the partnership interests therein. Puget-Pacific was officially dissolved by instrument dated September 10, 1982 and filed on October 12, 1982.

34. The aforesaid mortgages were executed by Defendant HFSL, Defendant SMITH, using the unregistered fictitious name of "Smith Development Corp.", and Defendant OKADA, using the unregistered fictitious name of "G.K.O. Corp.", all purportedly acting as an unregistered partnership known as Harbor Associates, general partner of Puget-Pacific.

35. On July 1, 1982, one or more of Defendants HFSL, SMITH and OKADA succeeded to the interest of Puget-Pacific, under the registered tradename "Harbor Associates" owned by Defendant HFSL.

36. Defendant HONFED is the successor to the interest of HONOLULU FEDERAL SAVINGS & LOAN ASSOCIATION.

37. Since October 3, 1969, Defendant HSHS and the Developers have wrongfully received rents, issues and profits from the subject property, in an amount which shall be proven at the time of trial.

38. Said rents, issues and profits rightfully belong to the beneficiaries of said 5(f) trust.

39. By virtue of the foregoing, Defendants HSHS, HFSL, SMITH, OKADA and HONFED claim an interest in the subject property adverse to the trustee, the State of Hawaii, and the beneficiaries of the 5(f) trust; Defendants' HSHS, HFSL, SMITH, OKADA and HONFED's claims are without any right whatever, and said defendant have no estate, right, title, lien or interest in or to said property or any part thereof.

40. By Act 32, Session Laws 1962, the First Legislature of the State of Hawaii provided that the management, administration and control of the § 5(f) trust lands was entrusted to the Department of Land and Natural Resources of the State of Hawaii, through its executive board the Board of Land and Natural Resources.

41. By virtue of the § 5(f) trust, State Defendants, as trustees owed a duty to Plaintiffs to recover possession of the Subject Property, and the rents, issues and profits wrongfully received by the Defendant HSHS and the Developers, for the uses and purposes set forth in paragraph 28, above.

42. In breach of their duties as trustees, State Defendants have failed to recover possession of the Subject Property or the rents, issues and profits therefrom; have further deposited all of the income from other trust properties into the general fund of the State and expended said funds upon purposes other than the uses and purposes set forth in § 5(f) of the Admission Act; and have failed to prepare an accurate inventory of all land and other property belonging to the trust estate.

44. Plaintiffs, as beneficiaries of said trust, have repeatedly requested said State Defendants to perform

their duties as trustees in accordance with the provisions of § 5(f) of the Admission Act, but State Defendants have failed and refused, and still fail and refuse, to comply with said requests.

45. If State Defendants are permitted to continue as unsupervised trustees of said trust estate, petitioners and the other beneficiaries of the trust will suffer great and irreparable loss and injury, and the assets of said trust estate will be wasted and totally lost.

46. Plaintiffs have no adequate remedy at law.

47. Defendants, acting under color of state law, have deprived Plaintiffs of rights guaranteed to them by § 5(f) of the Admission Act.

WHEREFORE, Plaintiffs pray:

A. That Defendants HSHS, HFSL, SMITH, OKADA and HONFED be required to set forth the nature of their claims to the property;

B. For a decree of this court determining all adverse claims of Defendants HSHS, HFSL, SMITH, OKADA and HONFED, and all persons claiming by through and under them, to said property;

C. For said decree to declare and adjudge that the trustee State of Hawaii owns the Subject Property in fee simple absolute, IN TRUST, however, for the uses and purposes set forth in § 5(f) of the Admission act; and said trustee is entitled to the quiet, lawful, and peaceful possession therefore, in trust, as aforesaid; that all right, title, and interest of Defendant HSHS in said property reverted to the trustee, State of Hawaii, by operation of law when Defendant HSHS ceased to use all of said land for a

sailors' home; and that Defendants HSHS, HFSL, SMITH OKADA and HONFED, and all persons claiming by, through and under them, have no estate, right, title, lien or interest in or to said property or any part thereof;

D. For said decree to permanently enjoin Defendants HSHS, HFSL, SMITH, OKADA and HONFED, and all persons claiming under them, from asserting any claim whatever in or to said property adverse to the trustee, State of Hawaii;

E. For judgment against all Defendants, jointly and severally, in the amount of all rents, issues and profits, wrongfully received by Defendants HSHS and the Developers from the subject property since October 3, 1969, when Defendant HSHS ceased to use all of said land for a sailors' home, together with interest thereon at the legal rate;

F. That Plaintiff DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, or some other suitable person having sympathy for the issues of concern to native Hawaiians, be appointed as co-trustee with respect to the property recovered herein on behalf of the trust estate;

G. That Plaintiff have judgment against all Defendants, jointly and severally, for their costs and attorney's fees incurred herein, pursuant to 42 U.S.C. § 1988.

H. That Plaintiffs have such other and further relief as may be just and proper.

DATED: Honolulu, Hawaii, July 21, 1989.

/s/ Walter R. Schoettle
WALTER R. SCHOETTLE,
Attorney for Plaintiffs,
MAUI LOA, *et al*

/s/ Kamuela Price
KAMUELA PRICE

APPENDIX "E"

Minister of the Interiors to Honolulu Sailor's Home Society Stamped $1.00.

Deed

Whereas by virtue of an act of the Legislature approved on the 25th day of August A.D. 1892, and entitled "An Act to Authorize the Minister of the Interior to convey to the Honolulu Sailors's Home Society a certain piece of land in the City of Honolulu, Island of Oahu." [T]he Minister of the Interior was authorized and directed to execute a conveyance of certain property in said act more particularly described and upon terms and conditions herein set forth. Now therefore know all men by these presents that I, J.A. King, Minister of the Interior of the Provisional Government of the Hawaiian Islands for and in consideration of the sum of One Dollar, the receipt whereof is hereby acknowledged and upon the following express conditions, ie: that the premises herein conveyed shall be used only for the purpose and uses of a Sailor's Home; that no intoxicating liquors shall be allowed to be drunk on the premises; that such Sailor's Home shall be equally available to the sailors of all nations; that if the herein described lot or any part thereof shall at anytime cease to be used for the purposes of a Sailor's Home, the whole of said lot shall forthwith revert to the Government of the Hawaiian Islands, do hereby give grant, bargain, sell and convey unto the Honolulu Sailor's Home Society, a corporation existing under the laws of the Hawaiian Kingdom that certain piece or parcel of land situate in the City of Honolulu,

and described more particularly as follows: Beginning at the North corner of Richards and Halekauwila Streets and running as follows, viz: N. 30 25 N thence 127.5 feet along mauka side of Halekauwila Street, N. 51 3 E. thence 137.7 feet along Grant 3474 to Trustees of the Sailor's Home Society, S. 37 50 E thence 135 feet along L.C.A. 738 to Kaunuoha (Enterprise Mill Property) S. 54 34 thence 156 feet along new line of Richards Street to the initial point. Area 19220 square feet. To have and to hold the afore granted premises with all easements, improvements and appurtenances thereto belonging to the said Honolulu Sailor's Home Society, to its use and behoof subject to the conditions and uses herein before set forth forever. In witness whereof I, the said J.A. King, Minister of the Interior, as aforesaid, have hereunto set my hand and the seal of the Department of the Interior this 21st day of March A.D. 1893.

Signed sealed and) J.A. King
delivered) Minister of the
in presence of) Interior.

Hawaiian Islands, island of Oahu. [] On this 21st day of March A.D. 1893 personally appeared before me J.A. King as Minister of the Interior known to me to be the person described in, and who executed the foregoing instrument who duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein set forth.

Malcolm Brown
Deputy Registrar of Conveyances.

Recorded and Compared this 23rd day of March A.D. 1893 at 9:58 o'clock A.M.

/s/ Malcolm Brown,
Deputy Registrar of Conveyances

APPENDIX "F"

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL CIRCUIT

STATE OF HAWAII

CIVIL NO. 28078

In the Matter of	)
	)
THE HONOLULU SAILORS' HOME SOCIETY,	)
	)
Petitioner.	)
	)

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

(Filed Jul. 2, 1969)

DAVID C. McCLUNG 330
446 Merchandise Mart Bldg.
Honolulu, Hawaii

Attorney for Petitioner.

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL CIRCUIT

STATE OF HAWAII

CIVIL NO. 28078

In the Matter of)
)
THE HONOLULU SAILORS')
HOME SOCIETY,)
)
Petitioner.)
)

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The above-entitled matter came on regularly for hearing on June 4, 1969, before the Court sitting in Chambers without jury, David C. McClung, Esq., appearing as counsel for the Trustees, and Arthur S. K. Fong, Esq., Deputy Attorney General, appearing as counsel for the State of Hawaii. The Court having heard the statements and arguments of both counsel, and the cause having been submitted to the Court for decision, and the Court being fully advised from the record and evidence presented in the premises now makes its findings of fact as follows:

FINDINGS OF FACT

1. That the material allegations in the Petition are true.

2. That the Petitioner owns two adjoining parcels located at Halekauwila and Richards Streets in Honolulu, Hawaii, the same being designated on the taxation maps

of the First Taxation Division as Tax Map Key Nos. 2-1-16-15 and 2-1-16-17, containing an area of approximately 29,325 square feet. Said parcels were conveyed to the Society on condition, among others, that the premises shall be used only for the purposes and uses of a Sailors' Home, equally available to sailors of all nations.

3. That on June 27, 1960, in Civil No. 6182, Judgment was entered by the Honorable Ronald B. Jamieson, to wit:

> "IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Trustees of the above entitled Society have discretion not only in the manner of constructing a new building on the premises located at Richards and Halekauwila Streets, Honolulu, Oahu, Hawaii, but also in additional and different use of said premises by leasing office space or shops without effecting a termination or forfeiture of the grant of said premises so long as said premises are also used for the purposes of said Society and for the use of sailors, including actual physical use of a substantial portion of the building for sailors."

4. That in response to a subsequent petition for the Society seeking instruction regarding an alternative lease and development agreement whereby the Society would receive and retain the use of a separate building located on a portion of its premises, Judgement was entered in Civil No. 18,551 by the Honorable Tom Okino on March 24, 1966 advising and instructing, inter alia, as follows:

> "That the project contemplated by the Trustees and Alakea Properties, Inc. wherein there is reserved to the Trustees a five-story building consisting of approximately 13,320

square feet does constitutes an actual physical use of a substantial portion of the premises for sailors within the meaning of the Judgment entered in this Court on June 27, 1960 in Civil #6182."

5. That subsequent to entry of Judgment in Civil No. 18,551, the Petitioner negotiated yet another development alternative comprised of a proposed development contract between the Petitioner and said Alakea Properties, Inc. and a proposed lease between the Petitioner and Harbor Properties, Ltd., a Hawaii corporation, as the general partner of Puget-Pacific, a Hawaii limited partnership.

6. That the proposed development contract contemplates the development by Alakea Properties, Inc. of the Petitioner's lands in conjunction with the adjacent lands owned by the Queen's Medical Center and provides for the payment to the Petitioner of a development fee of sufficient magnitude to defray the cost of that portion of the development which will be conveyed to the Petitioner for use as the Honolulu Sailors' Home pursuant to the purposes of the Petitioner.

7. That the proposed lease provides for the consolidation of the Petitioner's property with that of the Queen's Medical Center pursuant to Section 21-255 of the Comprehensive Zoning Code (Ordinance No. 3234) of the City and County of Honolulu; for submittal of the land and contemplated improvements to the Horizontal Property Regime established by Chapter 514, Hawaii Revised Statutes; and for the partial surrender of the resulting Honolulu Sailors' Home Society condominium apartment from the demise of the subject lease, whereupon the

Petitioner shall hold said condominium apartment free and clear of said lease for its sole use and benefit, subject only to the terms of its original grant and of the Declaration of Horizontal Property Regime previously filed pursuant to the terms of said lease.

8. That other portions of the proposed development contract and lease require the construction of a multi-purpose building on the combined premises having a replacement cost of not less than TEN MILLION DOLLARS ($10,000,000). The developer and lessee are required to provide assurance in form and with surety satisfactory to the Petitioner guaranteeing the completion of such construction free and clear of all mechanics' and materialmen's liens and to provide comprehensive general liability insurance naming the Petitioner as an additional assured.

9. That the other terms and conditions of the proposed development contract and lease appear fair, just and reasonable.

From the foregoing facts the Court concludes:

CONCLUSIONS OF LAW

1. That the proposed project contemplated by the proposed development contract with Alakea Properties, Inc. and by the proposed lease with Harbor Properties, Ltd., which provide for the construction of a Honolulu Sailors' Home Society condominium apartment as a portion of the entire development and for the conveyance of said apartment to the Petitioner for its sole use and benefit, free and clear of all encumbrances except the

terms of its original grant and of the Declaration of Horizontal Property Regime constitutes a use of said premises for the purposes of the Petitioner and does constitutes an actual physical use of a substantial portion of the premises for sailors within the meaning of the Judgments entered in Civil Nos. 6182 and 18,551.

2. That the other terms and conditions of the proposed development contract and lease are fair, just and reasonable, and, together with the proposed Declaration of Horizontal Property Regime, are within the sound discretion of the Trustees and the Trustees may enter into such agreements and amendments thereto and into any additional agreements as the Trustees in their discretion shall deem necessary or desirable to proceed with the project contemplated by the proposed development contract and lease attached to and made a part of the petition.

3. That in the event of a forfeiture to the State of Hawaii pursuant to the terms of the original grants, as now or hereafter modified, where caused without fault of the developer or Lessee, or those claiming by, through or under the same, such forfeiture would be subject to the proposed lease, development contract and Declaration of Horizontal Property Regime.

Let Judgment be entered accordingly.

DATED: Honolulu, Hawaii, this 1st day of July, 1969.

/s/ Thomas Ogata
Judge of the above-
entitled Court

APPROVED AS TO FORM:

/s/ David C. McClung
DAVID C. McCLUNG
Attorney for the Honolulu
Sailors' Home Society

/s/ Arthur S. K. Fong
ARTHUR S. K. FONG
Deputy Attorney General

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL CIRCUIT

STATE OF HAWAII

CIVIL NO. 28078

In the Matter of)
)
THE HONOLULU SAILORS')
HOME SOCIETY,)
)
Petitioner.)
)

JUDGMENT

(Filed Jul. 2, 1969)

DAVID C. McCLUNG 330
446 Merchandise Mart Bldg.
Honolulu, Hawaii

Attorney for Petitioner.

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL CIRCUIT

STATE OF HAWAII

CIVIL NO. 28078

In the Matter of)
)
THE HONOLULU SAILORS')
HOME SOCIETY,)
)
Petitioner.)
)

JUDGMENT

This cause came on regularly for hearing before the Court sitting in Chambers without jury on the 4th day of June, 1969, all parties being present by counsel and the Court being fully advised in the premises and having filed its Findings of Facts and Conclusions of Law and having directed that Judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED and the Petitioners are hereby instructed and advised:

1. That the proposed project contemplated by the proposed development contract with Alakea Properties, Inc. and by the proposed lease with Harbor Properties, Ltd., which provide for the construction of a Honolulu Sailors' Home Society condominium apartment as a portion of the entire development and for the conveyance of said apartment to the Petitioner for its sole use and benefit, free and clear of all encumbrances except the

terms of its original grant and of the Declaration of Horizontal Property Regime constitutes a use of said premises for the purposes of the Petitioner and does constitute an actual physical use of a substantial portion of the premises for sailors within the meaning of the Judgments entered in Civil Nos. 6182 and 18,551.

2. That the other terms and conditions of the proposed development contract and lease are fair, just and reasonable, and, together with the proposed Declaration of Horizontal Property Regime, are within the sound discretion of the Trustees and the Trustees may enter into such agreements and amendments thereto and into any additional agreements as the Trustees in their discretion shall deem necessary or desirable to proceed with the project contemplated by the proposed development contract and lease attached to and made a part of the petition.

3. That in the event of a forfeiture to the State of Hawaii pursuant to the terms of the original grants, as now or hereafter modified, where caused without fault of the developer or Lessee, or those claiming by, through or under the same, such forfeiture would be subject to the proposed lease, development contract and Declaration of Horizontal Property Regime.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that DAVID C. McCLUNG, attorney for the Trustees, be allowed a fee of up to $7,500.00 for his services rendered to the Petitioner in connection herewith.

DATE: Honolulu, Hawaii this 1st day of July, 1969.

/s/ Thomas Ogata
Judge of the above-entitled Court

APPROVED AS TO FORM:

/s/ David C. McClung
DAVID C. McCLUNG
Attorney for the Honolulu Sailors' Home Society

/s/ Arthur S.K. Fong
ARTHUR S.K. FONG
Deputy Attorney General

Civ No. 28078

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

In the Matter of

THE HONOLULU SAILORS' HOME SOCIETY,

Petitioner.

)
)
)
)
)

NOTICE OF ENTRY OF JUDGMENT

(Filed Jul. 2, 1969)

Pursuant to the provisions of Rule 77 (d), of the Hawaii Rules of Civil Procedure;

NOTICE IS HEREBY GIVEN

that on the 2nd day of July 1969, Judgment was entered in the above entitled causes.

DATED: Honolulu, State of Hawaii, this 2nd day of July, 1969.

Copies mailed to:
1. David C. McClung
   446 Merchandise Mart Bldg.
   Honolulu, Hawaii 96813

2. Arthur K. S. Fong
Deputy Attorney General
State of Hawaii
State Capitol Building
Honolulu, Hawaii 96813

BY ORDER OF THE COURT

/s/ _____
Clerk, Circuit Court of the
First Circuit, State of Hawaii.

91-1298

No. 91-1298

Supreme Court, U.S.
FILED
MAR 6 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM W. PATY, *et al.*,

Petitioners,

v.

DOCTOR NUI LOA PRICE., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF RESPONDENTS DOCTOR NUI LOA PRICE, THE HOU HAWAIIANS AND KAMUELA PRICE IN OPPOSITION TO PETITION FOR CERTIORARI

WALTER R. SCHOETTLE
Attorney at law
Counsel of Record for Petitioners Doctor Nui Loa Price and The Hou Hawaiians

KAMUELA PRICE, *pro se*

Suite 1012
1088 Bishop Street
P. O. Box 596
Honolulu, Hawaii 96809
Telephone: (808) 537-3514

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§ 5(f), Hawaii Admission Act, Pub.L. 86-3, 73 Stat. 4 (1959) . . . . . passim

STATEMENT OF THE CASE

On July 21, 1989, Maui Loa, The Hou Hawaiians and Kamuela Price (hereafter called "Plaintiffs") filed suit in the U.S. District Court for the District of Hawaii, pursuant to 42 U.S.C. § 1983, for deprivation of their rights conferred by § 5(f) of the Hawaii Admissions Act, P.L. No. 86-3, 73 Stat. 4 (1959).

On September 13, 1989, the state defendants, including petitioners, filed a motion to dismiss, citing the following grounds:

> "1. The State of Hawaii has not waived its sovereign immunity and hence this suit is barred by the Eleventh Amendment.
>
> "2. The State officials acting in their official capacities are protected by the Eleventh Amendment from this suit.
>
> "3. Plaintiffs have failed to state a claim against the State officials in their individual capacities *because none of the allegations against the State Defendants focus upon any alleged acts or omissions in State Defendants' individual capacities.*
>
> "4. Neither section 5(b) nor section 5(f) of the Hawaii Admission Act has any relevance to this case because the land in question does not fit the dexcription (*sic*) of 'public lands' as the term is used in the Joint Resolution of Congress of July 7, 1898 and section 5(b) of the Hawaii Admission Act. Therefore, there is no substantial federal question presented in this complaint.
>
> "5. A claim under 42 U.S.C. § 1983 is not properly alleged in this complaint.
>
> "6. Plaintiffs lack standing to maintain this action." [Emphasis added.]

The district court dismissed the complaint against

the state and state officials in their official capacities on Eleventh Amendment grounds and dismissed the complaint against the state officials in their individual capacities because the complaint involves only action taken, or not taken, in their official capacities. Op. Br. App., p. 29.

The Court of Appeals affirmed the first ruling but reversed the second.

ARGUMENT

Petitioners (hereafter called "state officers") are officials and former officials of the State of Hawaii, charged with the duty of enforcing the trust established by § 5(f) of the Hawaii Admissions Act. Several decisions by the Court of Appeals for the Ninth Circuit have held that Hawaii state officials can be held personally liable for damages for breach of their duties as trustees. *Price v. Akaka*, 928 F.2d 824 (9th Cir. 1990); *Price v. State of Hawaii*, 921 F.2d 950, 958 (9th Cir. 1990). The Court of Appeals has also repeatedly held that native Hawaiians, as special beneficiaries of that trust, have standing to bring such a suit. *Price v. State of Hawaii*, 764 F.2d 623, 630 (9th Cir. 1984); *Napeahi v. Paty*, 921 F.2d 897, 901 (9th Cir. 1990); *Price v. Akaka, supra*, 928 F.2d at 826-7.

In *Paty v. Napeahi*, 116 L.Ed.2d 230 (U.S. No. 90-1937, filed June 17, 1991), many of the state officers herein, sought a writ of certiorari from this Court on the question whether the Ninth Circuit decisions on standing are correct. In *Paty v. Napeahi*, plaintiffs herein filed an *amicus* brief arguing that the issue of standing had not been properly raised in that case and should be litigated in this case, instead. Amicus Brief of The Hou Hawaiians, *et al.*, No. 90-1937 at page 13.

The issue of standing was thoroughly briefed and argued below in this case. However, it has not been raised in this petition. Instead, the state officers have raised three new issues that were not raised in the district court.

Qualified immunity. The first question presented in *this* petition, is whether the state officers have qualified immunity. In footnote 1 of the petition it is argued that the state officers "invoked *Harlow* immunity quite specifically" in the district court. However, it is clear from the passage cited from the record that qualified immunity was not discussed in the district court. The Court of Appeals did not improperly conclude that qualified immunity had not been raised in the district court.

There are several important reasons why the issue of qualified immunity should not be decided for the first time on appeal. It is not even clear whether the state officers are entitled to raise the defense in the first place.

Qualified immunity is an *affirmative* defense, which courts have conferred upon state officials to *quickly* terminate burdensome litigation which would distract them from their official duties. The state officers did not raise the issue promptly and have, therefore, waived it.

In *Hunter v. Bryant*, 112 S.Ct. 534, 536 (1991), the government officials moved for summary judgment in the district court on qualified immunity grounds. That point clearly distinguishes *Hunter* from the instant case. The Attorney General of the State of Hawaii has been criticized by the Hawaii Supreme Court for using the immunity issue as a dilatory tactic. *See Brown v. Wong*, 71 Haw. 519, 795 P.2d 283 (1990).

Further, qualified immunity only applies to *discretionary* functions. In this case, the plaintiffs complain that the state officers have allowed trust property to be wrongfully used for private purposes. If true, this is clearly prohibited by § 5(f). The state officers do not have discretion to allow trust property to be used for private gain. Op. Br. App., p. 50, ¶¶ 37-38.

The state officers' argue that § 5(f) allows them to presently grant trust land to the Honolulu Sailors Home, as a public purpose. However, in this case the *land* is not being used for a sailors' home. It has been leased for development to provide an income stream for the Sailors' Home Society. The terms of the trust allow only the use of *land* for any public purpose. This argument would allow the use of *income* from the trust for any public purpose, and would, therefore, render the trust meaningless.

The § 5(f) trust does not allow the use of income for the purportedly public purpose of establishing a sailors' home. This is not a discretionary function. Qualified immunity simply does not apply.

Pleading requirements. The second question presented in the petition is a technical pleading question which is substantially identical to the issue raised in *Akaka v. Price*, 116 L.Ed.2d 455 (U.S. No. 90-1941, filed June 18, 1991), by another group of state officials who also have duties as trustees under § 5(f). In *Akaka v. Price*, plaintiffs argued that they relied on *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) and *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980) in drafting the complaint. The grounds advanced by state officers for their motion to dismiss make it clear that they were aware that they were being sued in their individual capacities.

Therefore, it would be unfair for this Court to establish a new pleading rule, unless plaintiffs were allowed to amend the complaint. In the posture of this case, this will accomplish nothing but to delay this litigation. The Court denied the petition on this issue in *Akaka v. Price*, No. 90-1941, and ought to do likewise here.

Equal footing. The state officers argue that § 5(f) trust obligations impose an encumbrance on their public lands that deprives them of equal footing with the other states. The truth is actually quite to the contrary.

Upon admission to the union, the other states received only a small portion of the federal lands within their boundaries for the support of the public schools. The amount granted varied between one section per township in the Northwest Territory to four sections per township in the desert lands of Arizona and New Mexico.

Hawaii received especially favorable treatment on her admission to the Union. Hawaii received nearly all of the public land within the state--1.4 million of the total of about 1.7 million acres. Under the formula used in other admission acts. Hawaii would have received between 50,000 and 200,000 acres.

In consideration for the extra land and as a condition of statehood, Hawaii agreed to comply with the terms of the Hawaiian Homes Commission Act of 1920, and to use the land "for the betterment of the condition of the native Hawaiians", in addition to the usual purpose of providing for the public schools.

In spite of this great generosity on the part of the federal government, the state has done little or nothing to improve the condition of the native Hawaiians, since 1959. Meanwhile, the trust lands have been abandoned to private interests, as in the instant case, or leased

out at bargain basement rates to campaign supporters and political cronies of state officials. The meager income has been deposited into the state general fund. These accumulated deposits resulted in a surplus of $500 million, which was distributed to the voters as a tax rebate in an election year.

Due to the state's failure to comply with the Hawaiian Homes Commission Act, the condition of native Hawaiians has seriously deteriorated to the point where many are homeless. The state now blames the federal government for the problem and cites the deplorable condition of the native Hawaiians as the grounds for requests for billions of dollars in federal aid for the Hawaiian Homes program.

Based on the foregoing, plaintiffs certainly agree with the state officers that the nature and scope of the rights of native Hawaiians to sue to enforce the § 5(f) trust is a very important question of federal law that has not been but ought to be decided by this court.

However, the question presented in this petition is a very narrow question of federal law involving the equal footing doctrine. This is the state's strategy of delay--to present one narrow issue at a time, reserving many other arguments on the same point to be litigated later. This is why the issue of qualified immunity was not raised in the district court. By dragging out the litigation over many years, the state officers are confident plaintiffs will die, run out of money, or otherwise lose interest or the ability to pursue this litigation.

If certiorari is granted herein and plaintiffs prevail, the state officials will continue to raise other arguments to the effect that § 5(f) does not create a right enforceable by § 1983. The state has plenty of money and all the time in the world. Unfortunately, native Hawai-

ians do not. True native Hawaiians, i.e. those of at least 50 percent aboriginal blood, are a race of people at the point of extinction. Only a few thousand remain alive. Time is running out for the native Hawaiian.

Rather than grant certiorari in this petition, the Court should grant certiorari in *Price v. State of Hawaii*, (No. 91-1273, U.S. filed Jan. 28, 1992). That case is a petition by plaintiffs herein, from the same decision of the Court of Appeals. The issues presented there are whether the Eleventh Amendment precludes direct suit against the State of Hawaii to enforce the § 5(f) trust, whether the complaint states a claim for prospective injunctive relief against the state officials in their official capacities, and whether the private defendants are engaged in state action by retaining possession of property allegedly belonging to the trust corpus.

If certiorari is granted in that case, the state officers will be able to raise *all* of their arguments that § 5(f) is not enforceable under § 1983, including the standing issue which they so vigorously argued below but, have not mentioned herein.

CONCLUSION

For the foregoing important reasons, Respondents Maui Loa, The Hou Hawaiians, and Kamuela Price respectfully request this Court to deny the Petition for Writ of Certiorari to the Ninth Circuit herein and to *grant* the Petition for Writ of Certiorari in *Price v. State of Hawaii*, No. 91-1273, instead.

Dated: Honolulu, Hawaii, March 2, 1992.

Respectfully submitted,

Walter R. Schoettle
(Counsel of Record)

Supreme Court, U.S.
FILED
MAR 12 1992
OFFICE OF THE CLERK

No. 91-1238

In The

Supreme Court of the United States

October Term, 1991

WILLIAM W. PATY, HERBERT J. APAKA, JR., MOSES W. KEALOHA, J. DOUGLAS ING, JOHN ARISUMI, HERBERT ARATA, AND JOHN WAIHEE,

Petitioners,

vs.

DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, THE HOU HAWAIIANS, and KAMUELA PRICE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

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ARGUMENT

I. Review Should Be Granted, Particularly in Light of *Hunter v. Bryant*, No. 90-1440 (U.S. Dec. 16, 1991), to Correct the Panel's Erroneous Deferral of the Qualified Immunity Issue.

Respondents' argument that the issue of qualified immunity (Question 1) is not before the Court is plainly wrong on two separate levels. *First*, that issue *was* raised in the District Court (*see* Pet. at 13-15 & n.1), but was not reached for the sole reason that the District Court found

that no individual-capacity relief had been sought whatsoever. *See* Pet. App. 28-29. *Second*, irrespective of whether the issue was presented as a defense to be adjudicated upon the motion raised in the District Court, there is no dispute, nor can there be, that the defense was raised as an alternative ground for affirmance in the Court of Appeals. As the Court of Appeals noted, "the state officials argue that the facts which appear on this record make it clear that they are entitled to qualified immunity." Pet. App. 8.

This alone preserves the issue for review here, and requires reversal, or, at a minimum, vacatur and remand for further consideration in light of *Hunter v. Bryant*, 112 S. Ct. 534 (U.S. Dec. 16, 1991), a decision whose benefit the panel below did not have when it last acted in this case. *Hunter* directly answers the question resolved by the Ninth Circuit in its deferral of the immunity issue, and prohibits the sort of judicial wheel-spinning that the Ninth Circuit has required of Petitioners in this case. The Ninth Circuit's decision to subject Petitioners to yet another round of litigation in the District Court, with yet another round of appeals in the offing no matter how the immunity issue is decided there, is wholly at odds with this Court's emphatic insistence that immunity issues be resolved "at the earliest possible stage in the litigation." *Hunter*, 112 S. Ct. at 536.

At the very least, the Court should grant the Petition, vacate the judgment, and remand for further consideration in light of *Hunter v. Bryant*. Even if, *arguendo*, this case is not "free from all obstacles to reversal on an intervening precedent," this Court should still vacate and remand in that *Hunter* is "sufficiently analogous, and,

perhaps, decisive, to compel re-examination of the case." *Henry v. City of Rock Hill*, 376 U.S. 776, 776-77 (1964) (per curiam). Certiorari should thus be granted as to Question 1 of the Petition.[1]

II. Review Should Be Granted to Correct the Ninth Circuit's Assumption that Individual-Capacity Relief Was Sought.

Respondents also offer no good reason for refusing to grant review as to the question left unresolved by *Hafer v. Melo*, 112 S. Ct. 358, 361 n.* (1991). Respondents' only argument is that Petitioners' pleadings in the District Court made it "clear that they were aware that they were being sued in their individual capacities" (Resp. Br. 4). This is neither wholly true, nor, in any case, sufficient, to counsel denial of review. As Petitioners asserted (*see* Resp. Br. 1), and as the District Court *held*, the Complaint's "only reference to a suit against defendants in their official capacities was plaintiffs' prayer for 'judgment against Defendants jointly and severally.' " Pet. App. 29, and, therefore, "fail[s] to state a claim against the state defendants in their individual capacities." *Id.* This determination the Ninth Circuit erroneously rejected, thus exacerbating the inter-circuit conflicts this Court identified in *Hafer*. Assuming, *arguendo*, that the straightforward application of immunity does not end this case, this case plainly presents an appropriate vehicle for resolving those recurring conflicts. Indeed, because an

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[1] Respondents' argument that Petitioners were not performing discretionary functions (Resp. Br. 4) is answered by the ruling in *Davis v. Scherer*, 468 U.S. 183, 196-97 & n.14 (1984).

amendment of the Complaint (*see* Resp. Br. at 5) would be futile against the individual capacity defendants in light of the statute of limitations under Respondents *own* theory (*i.e.*, that the twenty-year limitations period applicable to adverse possession in Hawaii (Haw. Rev. Stat. § 657-31) applies here), the issue whether Petitioners were properly sued in their individual capacities presents a question "antecedent to [the merits] and ultimately dispositive of the present dispute." *Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415, 416 (1990). Review should be granted as to the second Question.

III. Respondents Essentially Concede that the Third Question Presented – Relating to the Enforceability of Hawaii's Admission Act Via § 1983 – Merits the Granting of Review.

Respondents do not seriously dispute that whether Hawaii's admission act should be enforceable via 42 U.S.C. § 1983 is an issue that should be reviewed by this Court. They effectively conceded, in a previous amicus brief, that certiorari should be granted in this case if the Court deems the issues "important enough." *See* Brief of Amici Curiae, Hou Hawaiians, et al., No. 90-1937 (U.S. filed Aug. 23, 1991). Respondents readily agree, here, that "the nature and scope of the rights of native Hawaiians to sue to enforce the § 5(f) trust is a very important question of federal law that has not been but ought to be decided by this court" (Resp. Br. at 6). The Court should grant the Petition as to Question 3, or at least hold this Petition pending the disposition in the argued case, *Suter v. Artist M.*, No. 90-1488.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant the petition for certiorari. Because the Court of Appeals did not have the benefit of *Hunter v. Bryant*, 112 S. Ct. 534 (1991), the Court may wish to grant the petition, vacate the judgment, and remand for further consideration in light of *Hunter v. Bryant, supra*. Because of the relationship of Question 3 presented by the Petition to the issues in *Suter v. Artist M.*, No. 90-1488, the Court should at the least hold this Petition pending the disposition in No. 90-1488.

Dated: Honolulu, Hawaii, March 12, 1992.

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